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## Fair Use Old and New: The *Betamax* Case and its Forebears

M. B. W. SINCLAIR\*

### INTRODUCTION

ON January 17, 1984, the United States Supreme Court decided *Sony Corporation of America v. Universal City Studios, Inc.*<sup>1</sup> (*Betamax*), the first "fair use" decision the Court had ever handed down.<sup>2</sup> This Article examines the doctrine of fair use in American copyright law from its judicial origins, through its statutory recognition,<sup>3</sup> to its interpretation in this landmark Supreme Court decision.

Copyright is a legislatively created<sup>4</sup> bundle of rights in writ-

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1. 104 S. Ct. 774 (1984) [hereinafter cited as *Betamax*], *rev'g* 659 F.2d 963 (9th Cir. 1981), *rev'g* 480 F. Supp. 429 (C.D. Cal. 1979).

2. Two fair use cases had previously been granted certiorari, but both had been affirmed without opinion by an equally divided Court. *See, e.g.,* Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975); *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom. Columbia Broadcasting Serv., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958).

3. Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (1982)).

4. "[T]he copyright is the creature of the Federal statute passed in the exercise of the power vested in the Congress. As this Court has repeatedly said, the Congress did not sanction an existing right but created a new one." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). The myth that copyright in the United States has an alternate basis in natural law, that it is a natural right inhering in the author, has been thoroughly put to rest by Professor Abrams. *See Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983).

ings.<sup>5</sup> The legislative power to control copyright in the United States of America is granted to Congress in Article I, section 8 of the Constitution, which provides that "Congress shall have the power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>6</sup> Pursuant to this power, in 1791 Congress enacted the first federal copyright act,<sup>7</sup> which has been revised periodically. The present statute, the 1976 Copyright Act, became effective on January 1, 1978.

The rights of the copyright owner are limited to those set forth in the statute,<sup>8</sup> presently enumerated in section 106 of the 1976 Copyright Act. The rights relevant here are those of engaging in or authorizing (1) the reproduction in copies or phonorecords of, and (2) the preparation of derivative works based upon, the copyrighted work.<sup>9</sup> Sections 108 through 118 provide specific exemptions<sup>10</sup> from these rights. Section 107, the fair use section, is the primary subject of this Article:

SEC. 107. LIMITATIONS ON EXCLUSIVE RIGHTS: FAIR USE Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>11</sup>

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5. The word "writings" has always been broadly construed. *See, e.g.*, section 102(a) of the 1976 Copyright Act: "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ." 17 U.S.C. § 102(a) (1982).

6. U.S. CONST. art. I, § 8, cl. 8.

7. Act of May 31, 1790, ch. 15, 1 Stat. 124 (current version codified as amended at 17 U.S.C. §§ 101-810 (1982)).

8. *See, e.g.*, *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932).

9. 17 U.S.C. § 106 (1982).

10. L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 16-17 (1977).

11. 17 U.S.C. § 107 (1982).

This section is the first legislative recognition of fair use.<sup>12</sup> Prior to the 1976 Copyright Act, the doctrine had developed entirely at the hands of judges, as an "equitable rule of reason."<sup>13</sup>

Despite (or perhaps because of) 150 years of judicial development, the doctrine of fair use has proved notoriously difficult to define. Judge Learned Hand called it "the most troublesome [issue] in the whole law of copyright . . ."<sup>14</sup> Yet the need for the doctrine has always been evident.

As Professor Kaplan has so vividly stated, the right to copy seems fundamental to our society:

[I]f man has any "natural" rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and "progress," if it is not entirely an illusion, depends on generous indulgence of copying.<sup>15</sup>

The clash of rights, goals, and ideals with which fair use must cope is clear. On the one hand, there are the absolute rights granted to copyright owners by Congress in section 106 of the 1976 Copyright Act pursuant to the Constitution's mandate. On the other hand, there is the natural and necessary right to make use of, to imitate, and to develop prior works. Mediating these conflicting rights is the Constitution's prescribed goal: the promotion of the progress of science.

Section I of this Article outlines the common law development of the doctrine of fair use and examines various theories that have been offered as an explanation of and justification for the doctrine. The Section concludes by offering a fairly standard theory which, it is claimed, adequately captures the judicial doctrine as developed through 1977. Section II is devoted to section 107, its legislative history, its language, and its treatment by courts and commentators during the period beginning with its effective date and ending immediately prior to the *Betamax* decision. It argues that Congress has indeed succeeded in capturing the prior judicial doctrine, but only if the specific language of section 107 is properly construed. Section III outlines and analyzes the

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12. S. REP. NO. 473, 94th Cong., 1st Sess. 61 (1975) [hereinafter cited as 1975 SENATE REPORT].

13. *Id.* at 62; H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5689 [hereinafter cited as 1976 HOUSE REPORT].

14. *Dellar v. Samuel Goldwyn*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

15. B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2 (1967).

*Betamax* opinions in relation to the historical and statutory model developed in the first two parts. The Section concludes with a discussion of possible legislative action in light of the Supreme Court's decision.

# I. THE TRADITIONAL JUDICIAL DOCTRINE OF FAIR USE

Since 1790, the rights of the copyright owner have been specified by federal statute<sup>16</sup> enacted pursuant to the constitutional copyright power.<sup>17</sup> Prior to the enactment of the 1976 Copyright Act, these statutes<sup>18</sup> stated the copyright owner's rights specifically and absolutely. For example, the first statute, enacted in 1790, provided that the author or his assignee "shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books . . .,"<sup>19</sup> and the 1909 statute provided that "[a]ny person entitled thereto . . . shall have the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work."<sup>20</sup> This completeness of coverage and absoluteness of rights is in accord with the constitutional mandate that the goal of copyright be achieved "by securing . . . to authors . . . the exclusive right to their . . . writings."<sup>21</sup> Nevertheless, it would be absurd, for example, for the copyright law to prevent a reviewer or critic from quoting a subject work.<sup>22</sup> Indeed, prevention of

16. This is the enactment date of the first federal copyright statute. Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790) (current version codified as amended at 17 U.S.C. §§ 101-810 (1982)). Between 1783 and 1786 twelve states enacted copyright statutes. Those of two states (Maryland and Pennsylvania), however, being expressly dependent upon all states enacting such a law, never came into effect because of Delaware's failure to enact one. See B. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 104-24 (1967).

In 1672, the Massachusetts Bay Colony enacted the first American copyright law. *Id.* at 65-67. These laws were superseded by the federal statute.

17. U.S. CONST. art. I, § 8, cl. 8. See also *supra* text accompanying note 6.

18. Congress has revised or amended the copyright statute whenever necessary. The major revisions have been: Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of July 8, 1870, ch. 230, §§ 85-111, 16 Stat. 212-17; Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075; and the present statute, Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (1982)).

19. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124.

20. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (current version codified as amended at 17 U.S.C. § 106 (1982)).

21. U.S. CONST. art. I, § 8, cl. 8.

22. "[A] classic illustration of fair use is quoting from another's work in order to criticize it." *Wainwright Secs. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977). In 1960, Professor Latman noted that "there is apparently no reported American decision

such uses of copyrighted works would tend to "stifle the very creativity which [the copyright] law is designed to foster."<sup>23</sup> But how, in the face of the absolute exclusivity of the statutory right, is copyright infringement to be avoided in such a use?

The equitable doctrine of fair use developed as a judicial response to this question. Although the simple hypothetical case of quoting for review presents few problems, as soon as one considers even small variations the application of the doctrine becomes very difficult indeed.<sup>24</sup> It is sometimes said that the doctrine is "so flexible as virtually to defy definition"<sup>25</sup> and that it depends entirely on the facts of the particular case.<sup>26</sup>

Nevertheless, fair use is often defined as: "[A] privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."<sup>27</sup> This tells us very little as to when the question of fair use might appropriately be raised or, once raised, how it might be resolved; perhaps this is the reason for its popularity. The nonconstructive character of the definition is, however, hardly surprising when one considers the very wide variety of art forms and circumstances to which fair use has been applied. In his 1961 report to the House Judiciary Committee on copyright law revision, the Register of Copyrights gave the following list as illustrative of fair use:

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involving alleged infringement in the course of serious criticism." STAFF OF SENATE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION 9 (Comm. Print 1960) (Study No. 14, Latman, *Fair Use of Copyrighted Works*), reprinted in 2 STUDIES ON COPYRIGHT 5, 9 (Arthur Fisher mem. ed. 1963) [hereinafter cited as Latman, *Fair Use of Copyrighted Works*]. This remains true today.

23. *Iowa State Univ. Research Found. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

24. *See Dellar*, 104 F.2d at 662.

25. *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

26. "The cases emphasize that resolution of a fair use claim 'depends on an examination of the facts in each case [and] cannot be determined by resort to any arbitrary rules or fixed criteria.'" *Iowa State Univ.*, 621 F.2d at 60 (quoting *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978)).

27. *Meeropol*, 560 F.2d at 1068; *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1976). Note, *Copyrights—"Fair Use"*, 15 S. CAL. L. REV. 249 (1942); H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944) (citing *Story v. Holcombe*, 23 F. Cas. 171 (C.C.D. Ohio 1847) (No. 13,497); *Lawrence v. Dana*, 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8176).

quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.<sup>28</sup>

It would be surprising indeed if the same rule or rules applied, like litmus paper, to all these various circumstances. The picture is further complicated by the variety of means technology provides for using copyrighted work. Consider, for example, a sixty-second television report of a band parade which includes fifteen seconds of a copyrighted tune; this was held, properly, to be a fair use.<sup>29</sup> But suppose the report was in a newspaper and included ten bars of music: should the same rule apply?

The complex and diverse circumstances to which the doctrine applies does not mean that fair use cannot be usefully defined<sup>30</sup> or that fair use decisions are necessarily *ad hoc*.<sup>31</sup> A stable doctrine, implemented through a set of intelligent and systematic guidelines, can be developed, but one should not demand of it more specificity than is appropriate to the subject matter. Accordingly, over time there have been many secondary works which have classified uses to which the doctrine applies and have mapped the logical geography of those classifications.<sup>32</sup>

As in much academic work, the quest is usually for a unified

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28. REGISTER OF COPYRIGHTS, HOUSE COMMITTEE ON THE JUDICIARY, 87TH CONG., 1ST SESS., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (1961) [hereinafter cited as 1961 REGISTER'S REPORT]. This list is included in the legislative history of the 1976 Copyright Act; see 1975 SENATE REPORT, *supra* note 12, at 61-62; 1976 HOUSE REPORT, *supra* note 13, at 65.

29. *Italian Book Corp. v. American Broadcasting Cos.*, 458 F. Supp. 65 (S.D.N.Y. 1978).

30. *Cf. Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

31. *Cf. Iowa State Univ.*, 621 F.2d at 57; *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

32. A representative list of sources prior to the 1976 Copyright Act (and the investigations leading thereto) would include: H. BALL, *supra* note 27, at 259-92; E. DRONE, *THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS*, 386-99 (1879); Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT LAW SYMPOSIUM (ASCAP) 43 (1955); Latman, *supra* note 22; Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203 (1954); and Note, *supra* note 27.

source from which the diverse manifestations of the fair use doctrines can be derived. The question, however, "is not whether a certain activity is . . . a 'fair use,' but whether, in an emerging social and economic order, it *ought* to be . . ."<sup>33</sup> The problem of fair use is in spelling out the content of the "ought"—for the past, the present, and the future. This Section is addressed to the historical perspective.

### A. *Partial Justifications of Fair Use*

Among the justifications which have been offered for the doctrine of fair use are some that, while true to an extent, are analytically insufficient.

1. *Implied Consent.* It has sometimes been said that the doctrine of fair use can be based on the implied consent of the author.<sup>34</sup> "The author of a copyrighted book invites reviews, comments and criticism. And if his book deals with any of the sciences, portions of it may be used by others in the same field as a starting point for further development . . . ."<sup>35</sup> The argument has seldom been pushed very hard. It is implausible to say of a plaintiff seeking redress for infringement that he consented to it. Furthermore, use of the familiar "all rights reserved" notice denying permission to use any of the work without express consent effectively precludes the implied-consent defense.<sup>36</sup> Nor is the argument to be rescued by looking to the implied consent of the "reasonable" copyright owner.<sup>37</sup> Regardless of whether a reasonable author would consent to being the butt of a parody, or to being quoted in a scathing review, the determination as to reasona-

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33. Ladd, *To Cope with the World Upheaval in Copyright*, 10 COPYRIGHT 289, 294 (1983) (emphasis supplied), quoted with rather free ellipsis. Mr. Ladd, the present Register of Copyrights, actually wrote: "In the ultimate analysis, the question is not whether a certain activity is, for example, a 'fair use,' but whether, in an emerging social and economic order, it *ought* to be within the control of authors so that they can maintain independent creativity." *Id.*

34. See, e.g., *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938); *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905); *Karll v. Kurtiss Publishing Co.*, 39 F. Supp. 836, 837 (E.D. Wis. 1941); *Henry Holt & Co., Inc. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938).

35. Yankwich, *supra* note 32, at 209.

36. See Cohen, *supra* note 32, at 50-51; Latman, *supra* note 22, at 7.

37. "In other words, would the reasonable copyright owner have consented to the use?" Latman, *supra* note 22, at 15.



bleness is, ultimately, no more or less than a determination of fair use.

Two closely related notions suffer from similar weaknesses. First, it has been suggested that "as a condition of obtaining the statutory grant, the author is deemed to consent to certain reasonable uses . . ."<sup>38</sup> Second, "[j]ustification for a reasonable use of a copyrighted work is also said to be based on custom."<sup>39</sup> But it is the doctrine of fair use that will determine what is reasonable as well as which infringements are customarily permissible.

2. *De minimis*. The idea that fair use can, in at least some circumstances, be justified under the maxim *de minimis non curat lex* is likely to see a revival after its mention in both the majority decision and the dissenting opinion in *Betamax*.<sup>40</sup> Justice Blackmun's dissent provides appropriate examples. "Photocopying an old newspaper clipping to send to a friend may be an example; pinning a quotation on one's bulletin board may be another. In each of these cases, the effect on the author is truly *de minimis*."<sup>41</sup> These are useful counter-examples to an absolute claim that copying an entire work or copying for the same intrinsic function can never be a fair use, but they scarcely suggest that a lack of concern for *de minimis* reproductions is the basis of the doctrine. Where the justification has been mentioned in support of a fair use holding,<sup>42</sup> it has been to describe the harm that the defendant's use might impose upon plaintiff.<sup>43</sup> In contrast, the approach

38. Latman, *supra* at 7. See also Note, *supra* note 27, at 250.

39. Latman, *supra* note 22, at 7.

40. The *Betamax* majority quoted Professor Latman: "In certain situations the copyright owner suffers no substantial harm from the use of the work. . . . Here again, is the partial marriage between the doctrine of fair use and the legal maxim *de minimis non curat lex*." *Betamax*, 104 S. Ct. at 793 n.34 (quoting Latman, *supra* note 22, at 30).

41. *Betamax*, 104 S. Ct. at 4107. It has sometimes been claimed that copying by hand is always fair use, there being no reported cases to the contrary. See 3 M. NIMMER, NIMMER ON COPYRIGHT, § 13.05[E](a) (1983) (Nimmer does not agree with the claim). There is, however, a "report" of just such a case. In the middle of the sixth century, an Irish monk named Columba, while visiting his former teacher the Abbot Finnian, made a clandestine copy of the latter's Psalter. Finnian was furious and, when Columba would not surrender the copy, took his complaint before King Diarmid. The king decided the case for Finnian in words that have become an Irish proverb: "*Le gach boin a boinin, le gach leabhar a leabhran*." ("To every cow her calf, and consequently, to every book its copy.") See 3 THE COUNT DE MONTALEMBERT, THE MONKS OF THE WEST: FROM ST. BENEDICT TO ST. BERNARD 119-22 & n.2 (1867) [hereinafter cited as MONTALEMBERT].

42. E.g., *Mathews Conveyor Co. v. Palmer Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943).

43. This also is the point for which the *Betamax* majority mentions it.

has largely been unsuccessful in cases which involve insubstantial usage alone.<sup>44</sup>

3. *Piratical Intent*. Early English cases often looked to the intent of the defendant in making use of plaintiff's work. In *Carey v. Kearsley*,<sup>45</sup> Lord Ellenborough asked whether a particular use was "a pretext for pirating": "Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*? . . . or taken colourable, merely with a view to steal the copy-right of the plaintiff?"<sup>46</sup> Although intent has been taken into account in some American cases,<sup>47</sup> it is usually mentioned only for the purpose of asserting its irrelevance.<sup>48</sup> The reason that the absence of *animus furandi*, piratical intent, can not be the basis of fair use was stated clearly and eloquently by Vice Chancellor Wood in *Scott v. Stanford*:<sup>49</sup> "It is clear that my rights cannot be dependent upon the mere internal and occult workings of another man's mind."<sup>50</sup> Nevertheless, fair use is an *equitable* doctrine, and the courts have properly looked with suspicion upon defendants who could have but did not bother to pay a royalty.<sup>51</sup>

Two other theories justifying fair use have been advanced which cannot be dismissed so readily, if they can be dismissed at all. Indeed the problems with each seem to arise from their taking the other too lightly. The first is the economic, "market approach," as presented in detail by Professor Wendy J. Gordon.<sup>52</sup>

44. See, e.g., *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938).

45. 170 Eng. Rep. 679 (K.B. 1802).

46. *Id.* at 680.

47. See, e.g., *Webb v. Powers*, 29 F. Cas. 511 (C.C.D. Mass. 1847) (No. 17,323); *Conde Nast Publishing Co. v. Vogue School of Fashion Modeling*, 105 F. Supp. 325 (S.D.N.Y. 1952); *Broadway Music Corp. v. F-R Publishing Corp.*, 31 F. Supp. 817 (S.D.N.Y. 1940); *Farmer v. Elstner*, 33 F. 494 (E.D. Mich. 1888).

48. See, e.g., *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664 (7th Cir. 1950); *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282 (8th Cir. 1939); *Story v. Holcombe*, 23 F. Cas. 171 (C.C.D. Ohio 1847) (No. 13,497); *Reed v. Holliday*, 19 F. 325 (W.D. Pa. 1884).

49. 3 L.R.-Eq. 718, 36 L.J.R. New Series (Pt. 1, Chanc.) 729 (1867).

50. 36 L.J.R. New Series at 734 (curiously, this portion of the decision was not included in the original Equity Reports).

51. E.g., *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980).

52. See Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982), reprinted in 30 J. COPYRIGHT SOC'Y 253 (1983).

The second is the functional approach, which focuses on the ways in which plaintiff's work and the defendant's use of it affect society; in variant forms this approach is presented by Professor Leon E. Seltzer<sup>53</sup> and Professor Melville B. Nimmer.<sup>54</sup>

### B. *The Economic Model of Fair Use*

There are, unquestionably, economic considerations behind copyright law. As the Supreme Court has explained,

[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.<sup>55</sup>

This has led some to the conclusion that fair use can be determined by a simple utilitarian calculus: "The fair use doctrine is . . . applied when the societal interest in promoting second works or widening the dissemination of first works outweighs the financial interest of the copyright holder."<sup>56</sup> Professor Gordon,<sup>57</sup> however, commences her argument by swiftly discrediting this conclusion: if the second use is of such great societal interest, it will generate income sufficient to enable the user to pay the copyright owner for a license.<sup>58</sup>

Gordon argues that since the marketplace will handle most cases within the simple calculus, fair use must apply only in mar-

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For a sophisticated analysis of the "public goods" aspects of fair use economics, see Cirace, *When Does Complete Copying of Copyrighted Works for Purposes Other than for Profit or Sale Constitute Fair Use? An Economic Analysis of the Sony Betamax and Williams & Wilkins Cases*, 28 ST. LOUIS U.L.J. 647 (1984).

53. L. SELTZER, *supra* note 10, at 13-14.

54. 3 M. NIMMER, *supra* note 41, § 13.05.

55. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

56. Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 SANTA CLARA L. REV. 49, 58 (1981).

57. It is not possible to present in synopsis all the detail and rich persuasiveness of Professor Gordon's thesis. It is hoped, however, that the following does not do it too grave an injustice.

58. Gordon, *supra* note 52, at 1615. While this is a dramatic and apparently convincing counter to the simple utilitarian calculus, it rests on assumptions which, though pervasive, are seriously in error. See *infra* notes 86-104 and accompanying text. One should also note in passing that the description of fair use under attack here is really a description of the circumstances in which the copyright owner is likely to be able to find a licensee.

kets which have failed<sup>59</sup>—that is, markets in which the second user cannot buy a license.<sup>60</sup> The market for a license in a copyright might fail because the work is out of print,<sup>61</sup> because transaction costs (the costs involved in negotiating and obtaining a license) exceed the anticipated benefit,<sup>62</sup> because of time constraints,<sup>63</sup> because the benefit of the second use is not easily quantified monetarily,<sup>64</sup> or because the copyright owner is very unlikely to license the second use.<sup>65</sup>

Market failure is but the first test in Gordon's model. If it has occurred, the second test applies, which involves "balancing injury and benefit": "the court should determine if the use is more valuable in the defendant's hands or in the hands of the copyright owner."<sup>66</sup> Professor Gordon believes that one way of making this determination is by simulating the market inquiry: if the "market failure" were cured and "the price that the owner would demand [were] lower than the price that the user would offer, a transfer to the user will increase social value."<sup>67</sup> Thus, this test simulates the

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59. Gordon, *supra* note 52, at 1614-15. The market which may thus fail is defined in terms typical of welfare economics: (1) internal costs and benefits (i.e., paid or reaped by the parties to the transaction); (2) perfect knowledge; and (3) zero transaction costs. *See id.* at 1607-08.

60. *Id.* at 1614-15.

61. *Id.* at 1627-28. Note that in Professor Gordon's model, market failure is a necessary but not a sufficient condition for fair use; thus, that a book is out of print does not mean that anyone can copy it freely, but it will be a factor in determining whether a second use of it is a fair use. *See* 1975 SENATE REPORT, *supra* note 12, at 64.

62. Gordon, *supra* note 52, at 1628-29. Examples are photoreproduction or tape recording. "In such situations, transaction costs are likely to prevent at least some value-maximizing transfers from occurring . . ." *Id.* at 1629.

63. *See, e.g.*, 1976 HOUSE REPORT, *supra* note 13, at 68-69 (spontaneous use by a teacher).

64. Gordon, *supra* note 52, at 1630-32. *See, e.g.*, *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975) (benefits of medical research).

65. Gordon, *supra* note 52, at 1632-35. Examples are parody, satire, or competitive advertising, as in *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980).

66. Gordon, *supra* note 52, at 1615.

67. *Id.* This is a straightforward Kaldor-Hicks efficiency criterion: "A change is an improvement if those who gain evaluate their gains at a higher figure than the value which the losers set upon their losses." W. BAUMOL, *ECONOMIC THEORY AND OPERATIONS ANALYSIS* 378 (2d ed. 1965). Notice that there is no requirement that the loser be compensated from the winner's gains or from any other source. This criterion has gained little favor among economists. Professor Baumol writes: "[B]oth the Kaldor and the Scitovsky tests operate on the basis of an implicit and unacceptable value judgement. By using a criterion involving

implied-consent theory.<sup>68</sup> However, the more important cases are those in which the second use has significant benefits that are external to the parties, so that "the price that the defendant user would offer for use of the work will . . . understate the real social value of his use."<sup>69</sup>

If both the "market failure" and the "balancing of injury and benefit" tests are met, a third and final test applies: the "substantial injury hurdle": "Fair use should be denied whenever a substantial injury appears that will impair incentives."<sup>70</sup> Whereas the second test looks to the injury and benefit in the specific case, the final hurdle involves generalization on the specific facts. The issue at this stage is whether a finding of fair use would substantially impair plaintiff's or other authors' incentives.<sup>71</sup> To find for defendant on a fair use theory, a court must find that all three tests are satisfied.<sup>72</sup>

As with most economic analyses of the law, Professor Gordon's model has a distinct and tangible appeal: it appears scientific in that it relates the specific problem addressed to wider, more general social phenomena; it appears constructive in that it offers a means of determining a result once a specified set of conditions has been satisfied and specific values have been assigned. Moreover, it demystifies fair use, reducing it to the level of many other legal problems which, although still difficult, can be solved by essentially pedestrian procedures. Yet, desirable as such analysis may be, it is of no use if it does not adequately capture its subject matter. In the following paragraphs, specific criticisms will be made of steps one and two of Professor Gordon's model, followed by general criticisms of this whole approach to copyright law.

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potential money compensation, they set up a concealed interpersonal comparison on a money basis." *Id.* at 379. This is also true, ultimately, of Professor Gordon's model of fair use, especially in those important cases in which the gain from defendant's use runs to society and is not easily internalized as a monetary value. *See supra* note 64 and accompanying text. On the other hand, in those cases in which the fair use defense prevails, the plaintiff copyright owner gets no compensation at all for the use.

68. Gordon, *supra* note 52, at 1616-17.

69. *Id.* at 1615-16. *See, e.g.,* Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968).

70. Gordon, *supra* note 52, at 1618.

71. *Id.* at 1620.

72. Gordon suggests that her analysis is reflected in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1965). *See* Gordon, *supra* note 52, at 1647-52.

The types of "market failure" Professor Gordon describes amount to no more than examples of a would-be user's inability to buy a license<sup>73</sup>—indeed, in the case of excessively high transaction costs,<sup>74</sup> one should say inability *conveniently* to buy a license. But these are scarcely cases of *market failure*.<sup>75</sup> Suppose there is a long line at the ice-cream counter and I am in a hurry; the transaction costs are too high for me, but has this ice-cream market failed? Suppose I simply do not want to sell my house, despite the offer of a would-be buyer to pay better than a fair price;<sup>76</sup> is that market failure? The copyright owner will be understandably reluctant to license a parodist; is that market failure? While courts have not been kindly disposed toward plaintiffs who have taken a "dog in the manger"<sup>77</sup> attitude to offers to buy a license,<sup>78</sup> the fact remains that refusing to license any particular use is the copyright owner's prerogative. Thus, Professor Gordon's list of types of "market failure" amounts, roughly, to a list of the circumstances in which fair use has traditionally been an appropriate, even if not always successful, defense.

Having found failure in the market, the very foundation of the economic theory she is using,<sup>79</sup> Professor Gordon then resurrects it by judicial simulation in step two. It is as if litigation were considered to be "a continuation of negotiation by other means." But a copyright owner who cannot be induced to take a fee from the user surely will not permit the same use free. Yet this is precisely the result envisioned by Professor Gordon's judicial simulation.

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73. See *supra* notes 59-65 and accompanying text. Gordon recognizes that copyrighted works are, in an economic sense, public goods, but she fails to recognize the consequences of this. Cirace, however, provides a thorough, but complicated, analysis of these consequences. Compare Gordon, *supra* note 52, at 1610-12, with Cirace, *supra* note 52.

74. See *supra* note 62 and accompanying text.

75. A standard assumption of some economists is that a person will always sell if the price is right. Such an assumption, however, would merely deny the existence of market failure in many of Professor Gordon's examples.

76. See, e.g., *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (*Life* magazine refused offer by prospective publisher to pay for pictures, the publication rights of which were held by *Life*).

77. A dog does not eat hay and thus has no use for the manger; yet, its presence in the manger prevents other animals that do eat hay from enjoying the manger's benefits.

78. See *Rosemont Enters. v. Random House Inc.*, 366 F.2d 303, 311 (2d Cir. 1966) (Lombard, J., concurring). See also *Time*, 293 F. Supp. at 130.

79. Gordon, *supra* note 52, at 1601.

The cases to which Professor Gordon's notion of market failure seems most apt are those in which the critical benefits are external to the hypothetical transaction between plaintiff and defendant.<sup>80</sup> These are cases in which defendant's use is of great interest and benefit to society, but interest and benefit of a kind that will not be reaped, monetarily, by defendant; thus, the use will not generate income to pass along to the plaintiff copyright owner.<sup>81</sup> *Time Inc. v. Bernard Geis Associates*<sup>82</sup> is illustrative. Time had purchased the rights to the Zapruder film of the assassination of President Kennedy. Defendant copied two key frames in a "serious, thoughtful and impressive"<sup>83</sup> book analyzing the assassination. The district court held that the public importance of the book and its subject matter supported a finding of fair use.<sup>84</sup> Even in these cases, apparently, the court should estimate the economic value of this societal benefit so that it can be balanced against plaintiff's injury.<sup>85</sup>

Taking into account the externality of societal interest and benefit is a crucial aspect of fair use analysis—indeed, it is the cornerstone of American copyright law. But the problem here is one of reducing this externality into terms which can be used in calculating harm to the plaintiff copyright owner. Such reductions are endemic in economic analyses of the law.<sup>86</sup> Explaining a judicial

80. Such benefits or costs are called "externalities." "What converts a harmful or beneficial effect into an externality is that the cost of bringing the effect to bear on the decisions of one or more of the interacting persons is too high to make it worthwhile . . . ." Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROCEEDINGS 347, 348 (1967).

81. Gordon, *supra* note 52, at 1615-16, 1630.

82. 293 F. Supp. 130 (S.D.N.Y. 1968).

83. *Id.* at 131-32.

84. The majority's argument in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1965), is similar; the public benefit from medical research so impressed the court as to overwhelm other considerations.

85. Gordon, *supra* note 52, at 1616. Professor Gordon actually says courts *in fact* make intuitive estimates of social value, not that they *should*.

86. Consider the following extreme example:

[R]estraining young children from swinging on the refrigerator door represents an investment in the form of "repair" that may well be less costly than hiring a serviceman at a later date to install new hinges . . . [I]t is an allocative investment by a consumer that extends the useful life of the product by reducing the possibility of a future loss.

Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1309-10 (1981). There is no hint in the text that this is intended tongue-in-cheek.

decision by showing how the various policies, values, and actions were given economic values and balanced against each other demonstrates nothing; the assignments of economic value attributed to the judge will be those which support his or her decision. Unless there is some independent source of the economic value assignment, such as a genuine ongoing market,<sup>87</sup> the economic analysis is not an explanation but merely a disguised description.

Gordon clearly recognizes this difficulty.

When defendant's use contributes something of importance to public knowledge, political debate, or human health, it may be difficult to state the social worth of that contribution as a dollar figure . . . .

. . . What one deals with here may be not only traditional market failure, . . . but also a court's perception that the criterion of economic "value" is itself flawed.<sup>88</sup>

What Gordon does not seem to recognize is that because of such post-hoc valuation, her second test fails in precisely those cases in which her first test works. The defendant second user is not a suitable medium through which to reify the promotion of progress of science.

Nor is the other side of this economic balancing—the injury to the plaintiff copyright owner—immune to attack. The Honorable David Ladd, United States Register of Copyrights, has spoken forcefully against this "unhistoric interloper" in the law of copyright.<sup>89</sup> To throw upon the plaintiff<sup>90</sup> the burden of proving that his injury outweighs the benefits of the defendant's use would be quite contrary to the spirit, tradition, and statutory law of copyright.<sup>91</sup> The point of providing statutory "in lieu" damages<sup>92</sup> as an

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87. Of course there is no market in children swinging on refrigerator doors. However, there might be an empirical study showing deterioration rates of such doors from which the economic value of each swing could be deduced. This kind of data, however, is not available to one seeking to assess the general benefit to society in question in *Betamax*.

88. Gordon, *supra* note 52, at 1631-32 (footnotes omitted).

89. See Ladd, *Economic Harm: A Trojan Horse in Copyright*, in A.B.A. SECTION OF PATENT, TRADEMARK & COPYRIGHT LAW, SUMMARY OF PROCEEDINGS, 1982, at 157 (luncheon address) [hereinafter cited as Ladd, *Trojan Horse in Copyright*]; Ladd, *The Harm of the Concept of Harm in Copyright: The Thirteenth Donald C. Brace Memorial Lecture*, 30 J. COPYRIGHT SOC'Y 421 (1983) [hereinafter cited as Ladd, *Harm in Copyright*].

90. The allocation of the burden of proof in a fair use defense raises difficult questions. But in the context of steps two and three of Professor Gordon's model, who else but plaintiff is there?

91. See generally, Ladd, *supra* note 89.

92. *E.g.*, 17 U.S.C. § 504(c) (1982).



alternative to actual damages is that plaintiff's damages are often impossible to quantify. Mr. Ladd puts it very strongly: "To posit, in any sense, a finding of 'fair use' on the absence of demonstrable present damages is to do nothing less than deprive copyright of any future life."<sup>93</sup> Yet demonstrating quantified damages is exactly what is required in step two of Professor Gordon's model.<sup>94</sup>

Even if the plaintiff is able to quantify his or her damages, it is not clear that the proper balance can be struck. The economic philosophy of the Supreme Court focuses not on the harm to the copyright owner but on the harm to the incentive to authors. It is assumed that plaintiff's damages provide a reasonable measure of the detriment to incentives; the assumption, however, is not beyond significant empirical doubt.<sup>95</sup> If there has to be value balance here it should be between the societal benefit in promotion of the progress of science and the detrimental impact on incentives to authorship. Neither of these is readily amenable to translation into monetary values.

There is a more pervasive problem with economic analyses of copyright law—indeed, of any area of law. Professor Walzer<sup>96</sup> has provided the insight necessary to bringing this problem to the fore. According to Professor Walzer, goods (of all kinds, including services, labor, ideas) have social meanings and social importance that can often be quite independent of their market (dollar) values.<sup>97</sup> What counts as efficiency, what the proper maximand in a value calculus is, and even what the nature of that calculus itself will be, are questions which are decided in terms of these social meanings and values. In any given structural sphere of society there is likely to be one social value, the "dominant value" of that sphere, which determines or should determine the distribution of the goods within it.<sup>98</sup> Distributive justice is not uniform but varies

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93. Ladd, *A Trojan Horse in Copyright*, *supra* note 89, at 159.

94. If potential future damage is also to be estimated, quantitatively, the balancing again becomes so speculative as to bear little, if any, relation to reality.

95. See Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 293-313 (1970).

96. See M. WALZER, *SPHERES OF JUSTICE* (1983).

97. *Id.* at 6-10.

98. In some spheres, (e.g., futures trading) the dominant value will, of course, be straightforwardly economic. The dominant value in the sphere of copyright is given in the Constitution. See U.S. CONST. art. I, § 8, cl. 8. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

according to its subject matter—its sphere of justice. There is no reason to believe that the dominant value of one sphere should be the same as that of another; one would not expect the same criterion of justice to apply in the distribution of automobiles, welfare payments, and spouses. Nor is there any reason to believe that there is any common denominator of dominant values. Things tend to go awry when the dominant value of one sphere is supplanted by that of another.

In the sphere of literature and the arts—that is, the sphere of copyright—the dominant value is given in the Constitution: “To promote the progress of science . . . .”<sup>99</sup> As Mr. Ladd puts it: “Copyright should boost the GNP of mind and feeling.”<sup>100</sup>

Already we can see in literature and the arts the effects of the invasion of the profit motive to the exclusion of all else.<sup>101</sup> Anyone who watches television cannot but be saddened by the impact of this displacement; there seems to be an entertainment analogue of Gresham’s Law: bad television drives out good television.<sup>102</sup>

So may it be on the commercial side of the creative arts, and there is little that copyright law can or should do about it. Justice Holmes properly warned against making artistic merit a condition of copyright protection.<sup>103</sup> It would nevertheless be wrong for copyright law likewise to accept the usurpation of its proper dominant value by profit.<sup>104</sup>

99. U.S. CONST. art. I, § 8, cl. 8. “Science,” as used in the late eighteenth century, was intended in the sense of the Latin “scire,” meaning all knowledge.

100. Ladd, *Harm in Copyright*, *supra* note 89, at 429.

101. Anthony Burgess writes of “Irving Wallace, Arthur Hailey, Frederick Forsyth, Ken Follett and other practitioners of well wrought sensational fiction”: “They do not pretend to be Henry James; they expect, unlike James, to make money out of a popular commodity.” N.Y. Times, Feb. 5, 1984, § 7, at 1, 36 (book review section). This is not to disparage popular fiction; but today, when major publishing houses are controlled by merchant bankers and oil company executives rather than lovers of literature, one wonders how a Henry James would find a publisher.

102. Sir Thomas Gresham, a sixteenth-century British financier, is noted for the economic principle that “bad money drives out good money.” See F. SALTER, *SIR THOMAS GRESHAM* 37 (1925). Gresham actually expounded this principle in somewhat more Elizabethan terms: In a letter to Her Majesty, he reported:

[T]he first occasion of the fall of the Exchange did grow by the King’s Majesty, your late Father, in abasing his coin from vi ounces fine to iii ounces fine. Whereupon the Exchange fell from xxxvi viid to xiiis iud, which was the occasion that all your fine gold was conveyed out of this your realm.

*Id.*

103. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1908).

104. This is not to say that copyright owners ought not seek to maximize their profits;

C. *The "Intrinsic-Extrinsic" or "Functional" Approach to Fair Use*

Seltzer<sup>105</sup> and Nimmer<sup>106</sup> differ from Gordon in that they would not permit copying for a purpose which is not itself independently productive. Professor Gordon, who would allow such usage despite its being for the same intrinsic function, acknowledges that on her analysis "the 'productive' status of a user is at best merely a secondary indicator . . . ." <sup>107</sup>

Seltzer states the historical case most forcefully; of the Register's illustrative list of areas of application of the fair use doctrine,<sup>108</sup> he writes:

The list, casual or studied as it may be, reflects what in fact the subject matter of fair use has in the history of its adjudication consisted in: *It has always had to do with the use by a second author of a first author's work.* Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose—to make what might be called the "ordinary" use of it. When copies are made for the work's "ordinary" purposes, ordinary infringement has customarily been triggered, not notions of fair use.<sup>109</sup>

Professor Nimmer, albeit in different language, makes essentially the same point, but with less historical and more normative emphasis: "if . . . the defendant's work, although containing substantially similar material, performs a different function than that of the plaintiff's, the defense of fair use may be invoked."<sup>110</sup> The distinction is clearly illustrated by *Karll v. Curtis Publishing Co.*<sup>111</sup> In that case, the Saturday Evening Post had published the copyrighted lyrics to the chorus of the Green Bay Packers' "official song" in an article on the town of Green Bay. The court sustained the fair use defense largely because "the later work differs greatly

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the economic philosophy still lies behind the constitutionally mandated means of furthering copyright's goal. See *supra* text accompanying note 55. It is, however, curious that we tend to socialize the production of many of the works that we expect to be the most instrumental in promoting the progress of science and the useful arts.

105. See generally L. SELTZER, *supra* note 10.

106. See 3 M. NIMMER, *supra* note 41, § 13.05.

107. Gordon, *supra* note 52, at 1601.

108. See *supra* text accompanying note 28.

109. L. SELTZER, *supra* note 10, at 24 (emphasis supplied).

110. 3 M. NIMMER, *supra* note 41, § 13.05[B]. It is this same distinction that is referred to by Professor Gordon as "productive." It has also been characterized, usefully, by the dichotomy between "iterative" (same-purpose) and "interactive" (new-purpose) copying. See Note, *Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era*, 96 HARV. L. REV. 450 (1982).

111. 39 F. Supp. 836 (E.D. Wis. 1941).

in nature, scope, and purpose from the original."<sup>112</sup>

A second feature of Professor Gordon's analysis with which Professor Nimmer would presumably differ is that it would permit the fair use defense even where the defendant had copied plaintiff's work in its entirety.<sup>113</sup> Even in criticism, which is the paradigm fair use purpose, there is a limit to how much of plaintiff's work may be reproduced. "[C]opying substantially all of the plaintiff's work for the asserted purpose of literary (or religious) criticism, will not constitute fair use."<sup>114</sup> Just such a consideration was critical in *Benny v. Loew's Inc.*<sup>115</sup> The comedian Jack Benny had made a television parody ("Autolight") of plaintiff's prize winning motion picture "Gas Light." The fair use defense was denied since the parody was held simply to have used too much of the original: "If the material taken by appellant from 'Gas Light' is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue."<sup>116</sup> The court also quoted a well known passage from an earlier Ninth Circuit opinion: "Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can *ever* be fair use."<sup>117</sup>

The most striking counter-example is *Williams & Wilkins Co. v. United States*.<sup>118</sup> Two government libraries had photocopied arti-

112. *Id.* at 837-38. Professor Nimmer contrasts this case with *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282 (8th Cir. 1939), in which the defendant had printed the chorus lyrics of plaintiff's song but in a song-sheet pamphlet; appropriately, no fair use was found. 3 M. NIMMER, *supra* note 41, § 13.05[B].

113. That Professor Gordon's analysis encompasses 100% copying is demonstrated by her use of *Williams & Wilkins* as an illustration. See Gordon, *supra* note 52, at 1647-52.

114. 3 M. NIMMER, *supra* note 41, § 13.05[B].

115. 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court sub nom.* Columbia Broadcasting Serv. v. Loew's Inc., 356 U.S. 43 (1958).

116. *Benny*, 239 F.2d at 536. One does not have to agree wholeheartedly with the decision to understand the point.

117. *Id.*, (quoting *Leon v. Pacific Tel. & Tel.*, 91 F.2d 484, 486 (9th Cir. 1937) (emphasis added in *Benny*)). Among other things the plaintiff in *Leon* was the publisher of a telephone directory; the defendant published a telephone directory derived from it but using the numerical order of the telephone numbers.

Other noteworthy cases in which the fair use has failed because of too great an appropriation of plaintiff's work include *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (Justice Story's opinion contains a wealth of basic fair use lore) and *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914) (the "Mutt and Jeff" case) (appropriation led to decrease in demand for plaintiff's original work).

118. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376

cles from plaintiff's copyrighted medical journal at the request of medical researchers;<sup>119</sup> these copies were for the same intrinsic purpose as the originals and usually copied substantially all of the original work. The case was extremely close: The trial judge found in favor of plaintiff;<sup>120</sup> the Court of Claims reversed, splitting 4-3; and the Supreme Court affirmed, splitting 4-4. As mentioned earlier, the majority in the Court of Claims was overwhelmed by the social importance of the second users' work: medical research. It expressly rejected the argument that "the copying of an entire work, any such work, cannot ever be 'fair use'" as "an overbroad generalization, unsupported by the decisions . . . ."<sup>121</sup> Not surprisingly, the decision has met with little approval from the commentators.<sup>122</sup> Professor Nimmer asserted that it was "seriously in error."<sup>123</sup> Nevertheless the case should serve to remind us that the "rules" against second uses for the same intrinsic function and one-hundred percent copying are not absolute. At the very least there are the *de minimis* counter-examples;<sup>124</sup> there may be more.

#### D. *The Constitutional Justification of Fair Use*

The essence of these different approaches can be captured in a useful and historically accurate synthesis based on copyright

(1975).

119. This was done on a quite remarkable scale, one library having made "86,000 Xerox copies in 1970 constituting 930,000 pages," the other, in 1968, "distributed 120,000 copies of such journal articles, totalling about 1.2 million pages." 487 F.2d at 1364 (Cowan, J., dissenting).

120. 172 U.S.P.Q. (BNA) 670 (1977).

121. *Williams & Wilkins*, 487 F.2d at 1353. In support, the majority referred to handwritten copies for personal use, copies of cases, annotations and law review articles for courts, and to the copying of newspaper items. *Id.* See *supra* note 41 and accompanying text.

122. See, e.g., L. SELTZER, *supra* note 10, 39-41; Goldstein, *The Private Consumption of Public Goods: A Comment on Williams & Wilkins v. United States*, 21 BULL. COPYRIGHT SOC'Y 204 (1974); Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 UCLA L. REV. 1052 (1975) (the reference in the title is to Judge Nichols' remark in his *Williams & Wilkins* dissent that "[w]e are making the Dred Scott decision of copyright law." *Williams & Wilkins*, 487 F.2d at 1387).

123. 3 M. NIMMER, *supra* note 41, at § 13.05[E](c). Congress also has effectively disavowed the decision by removing library copying from the ambit of fair use, including it in a clearly and closely rule-governed exemption provision: section 108 of the 1976 Copyright Act. 17 U.S.C. § 108 (1982).

124. See *supra* text accompanying notes 40-41.

law's first principle:<sup>125</sup> "The fundamental justification for the [fair use] privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, 'To Promote the Progress of Science and the Useful Arts'."<sup>126</sup> In favor of a claimed fair use a court will have to consider the extent to which the second use in question does serve this constitutionally mandated purpose. Such consideration must be given, however, only to the extent that defendant's second use promotes this goal independently of the plaintiff's first use: if the second use serves to "boost the GNP of mind and feeling"<sup>127</sup> in the same manner as does the first, nothing will be gained by permitting the incursion into plaintiff's copyright. Thus, the general prohibition against second uses for the same intrinsic purpose as the first use follows from the fundamental purpose of copyright law.

On the other side is the means Congress must use in promoting this goal: "by securing for limited times to authors . . . the exclusive right to their . . . writings."<sup>128</sup> As noted above,<sup>129</sup> the federal copyright statutes prior to the 1976 Copyright Act, in accord with the mandated exclusivity, state the copyright owner's rights absolutely. There is, then, a tension between the goal of copyright protection and the means of achieving it.<sup>130</sup>

The connection between the constitutional purpose and the means of copyright law lies in the "economic philosophy" articulated in *Mazer v. Stein*:<sup>131</sup> granting authors monopolies (albeit of limited duration) provides them with the income and the incentive to enable them to produce. The value of this monopoly is realized by the copyright owner through the distribution of his or her work to the public at a price. It follows that a second use which

125. This analysis is not new. It can be found explicitly in *Farmer v. Calvert Lithographing*, 8 F. Cas. 1022, 1026 (C.C.E.D. Mich. 1872) (No. 4561): "The courts, in the interest of learning and science, have at all times and in all countries recognized the right of subsequent authors, compilers, and publishers to use the works of others to a certain extent . . . ." See also *Rosemont Enters., Inc. v. Random House Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Cary v. Kearsley*, 170 Eng. Rep. 679, 680 (K.B. 1802).

126. *Rosemont*, 366 F.2d at 307.

127. See *supra* text accompanying note 100.

128. U.S. CONST. art. I, § 8, cl. 8.

129. See *supra* text accompanying notes 35-38.

130. See Walker, *Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium*, 43 LA. L. REV. 735 (1983).

131. 347 U.S. 201 (1954). See *supra* note 55 and accompanying text.

amounts to no more than an additional or different mode of distribution should not be fair use; this would be a use precisely contrary to the constitutionally mandated method of furthering copy-right's goal.<sup>132</sup> Copying by the defendant of all or substantially all of the plaintiff's work will usually effect an alternative means of dissemination; accordingly it is not surprising that we find a general rejection of the fair use defense in such cases.

Thus the general rules against second uses for the same intrinsic purpose and one-hundred percent copying both follow from the constitutional foundation of copyright. There is good historical reason to believe that this was the original intent. Prior to the enactment of the first federal copyright statute in 1790, four states<sup>133</sup> had provisions in their copyright statutes for issuing

132. *Lawrence v. Dana*, 15 F. Cas. 26, 59 (C.C.D. Mass. 1869) (No. 8136): "[I]t is difficult to acquiesce in the reason sometimes given, that the compiler of an abridgment is a benefactor to mankind, by assisting in the diffusion of knowledge." See also *Wainright Secs., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977); *Bell v. Whitehead*, 3 Jurist. 68, 8 L.J. (Ch.) 141 (Chanc. 1839). But see *Williams & Wilkins*, 487 F.2d at 1353. For treatment of this argument by the majority in *Betamax*, see *infra* text accompanying note 247.

133. Connecticut, Georgia, New York, and South Carolina. See B. BUGBEE, *supra* note 16, at 104-24. The relevant part of the Connecticut statute read:

*Be it further enacted*, That when ever any such Author or Proprietor of Such Book, Pamphlet, Map or Chart, shall neglect to furnish the Public with sufficient Editions thereof, or shall sell the same at a Price unreasonable, and beyond what may be adjudged a sufficient Compensation for his Labour, Time, Expense, and Risque of Sale, the Judge of the Superior Court in this State, on Complaint thereof made to him in Writing, is hereby authorized and empowered to summon such Author or Proprietor to appear before the next Superior court . . . and said Court are hereby authorized and empowered to enquire into the Justice of said Complaint, and if the same be found true, to take such sufficient recognizance and Security of such Author or Proprietor, conditioned that he shall within such reasonable Time, as said court shall direct, publish and offer for Sale in this State, a sufficient Number of Copies of such Book, Pamphlet, Map or Chart, at such reasonable Price as said Court shall, on due Consideration affix: And if such Author or Proprietor shall, before said Court, neglect or refuse to give such Security as aforesaid, the court are hereby authorized and empowered to give such Complainant, a full and ample Licence to re-print and publish such Book, Pamphlet, Map or Chart, in such Numbers and for such Term as said Court shall judge just and reasonable: Provided said Complainant shall give sufficient Security before said Court, to afford said re-print Edition at such reasonable Price as said court shall thereto affix.

Act for the Encouragement of Literature and Genius, 1783 Conn. Pub. Acts and Laws, printed in *ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA* 133, 134 (E. Babcock ed. 1786). For a discussion of this part of the seminal Connecticut Act, see B. BUGBEE, *supra* note 16, at 108-09.

a compulsory license to another should the copyright owner fail to make the work available or fail to make it available at a reasonable price.<sup>134</sup> The members of the first Congress were unquestionably aware of these provisions and yet chose not to incorporate them in the first copyright statute.<sup>135</sup> Since then, when Congress has intended to provide for one-hundred percent uses for similar purposes, such as in compulsory licensing for recording music, it has done so expressly.<sup>136</sup> The absence of general provisions of this kind in the first copyright statute and subsequent revisions can only be intended.<sup>137</sup>

Having found the defendant's second use to be neither a substantial duplication of plaintiff's first work nor a use for the same intrinsic purpose as the first, a court must then decide the key judgmental issue: is the second use of such value to the promotion of knowledge and understanding as to outweigh its detrimental impact upon author's incentives? Ascertaining the detriment to incentives is one of the most neglected difficulties of fair use analysis. As Breyer<sup>138</sup> has shown, loss of incentive does not follow automatically from even quite substantial imperfections in the copyright owner's monopoly. That the relatively minor imperfection caused by the claimed fair use has any impact whatsoever on incentives would seem doubtful. Nevertheless, in the absence of a better test, the actual or potential harm to plaintiff is the standard for detrimental impact on authors' incentives.

On the assumption that harm to plaintiff is the proper measure of disincentive, the task becomes one of balancing the societal value of the second use with its encroachment on plaintiff's "exclusive" rights.<sup>139</sup> "[C]ourts in passing upon particular claims

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134. North Carolina had a provision for enforcing a fair price. See B. BUGBEE, *supra* note 16, at 120.

135. Act of May 31, 1790, ch. 15, 1 Stat. 124 (current version codified as amended at 17 U.S.C. §§ 1-810 (1982)).

136. Compare, section 115 of the 1976 Copyright Act, 17 U.S.C. § 115 (1982), with section 1(e) of the 1909 Copyright Act, Act of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075-76.

137. See generally Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).

138. See Breyer, *supra* note 95, at 293-313.

139. This is very similar to Marsh's statement of fair use quoted above; see *supra* text accompanying note 56. The fallacies in Professor Gordon's counter to it should now be clear: first, the values promoted by the second use cannot and ought not be reduced to economic units; second, the harm to plaintiff is not necessarily a true measure of harm to



of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."<sup>140</sup> There may be balancing here, but it is not delicate; the balance must be tipped solidly in defendant's favor for the fair use defense to prevail. Usually this requires there be at most a very minor impact on plaintiff's rights, together with a clearly valuable second use.

The fair use doctrine might best be described not in terms of affirmatively serving copyright's purpose, but rather as a guard against the negative effects of too punctilious an enforcement of plaintiff's rights. Lord Mansfield expressed the dangers thus:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.<sup>141</sup>

Fair use guards primarily against the latter danger, but always subject to the constraints imposed by the former.<sup>142</sup>

This balancing is not an economic one; even calling it a "balancing" is misleading because there is no reason to expect that the benefits and harms of a given second use can be expressed in commensurate terms. Similarly, one cannot expect precisely the same constitutive elements to be present or to have the same proportionate influence in different cases.<sup>143</sup> Indeed, even within a given type of use the scope of fair use might change as conditions in society change; were today's world not one of "unrelieved solem-

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incentives.

140. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964); *see also Rosemont*, 366 F.2d at 307.

141. Sayre v. Moore (K.B. 1785) (Mansfield, C.J.), *reprinted in* Cory v. Longmen, 1 East. 358, 361 n.(b), 102 Eng. Rep. 138, 139 n.(b) (K.B. 1801). It is not surprising that this is stated in terms of the copyright owner's monopoly rather than terms regarding incentives to authors: Lord Mansfield was a firm believer in a natural law copyright of perpetual duration inhering in an author by virtue of his creation of the work (following in the classic liberal tradition of John Locke). *See* J. LOCKE, *SECOND TREATISE OF GOVERNMENT* 27 (1690). *See also* Millar v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769). That Mansfield's view has always been rejected in the United States highlights the technical inaccuracy of this passage; the true risk is that authors' incentives will be impaired.

142. *See* L. SELTZER, *supra* note 10, at 28-37 ("dual-risk" approach to fair use).

143. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).

nity,"<sup>144</sup> the fair use privilege to parody might not be so broad.

Consider the facts of *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*<sup>145</sup> The defendant had used three sentences of plaintiff's treatise on the nature and care of the human voice in an advertising pamphlet (the excerpts constituting about one-twentieth of the pamphlet). The second use was of only a small fraction of plaintiff's work and for a quite different function; it could scarcely have had serious impact on plaintiff's sales of the work or the author's incentive to produce further such works. Yet, on the other hand, the second use in question did so little to "promote the progress of science" or to "increase the GNP of mind and feeling" that the court quite properly felt justified in denying the fair use privilege to defendants. Note, however, the significant danger of this approach: literary and artistic judgment and even motives of censorship<sup>146</sup> could cause a court illegitimately to devalue the social importance of a second work.<sup>147</sup>

This explication of the fair use doctrine appears to capture the major threads of judicial thought in the decisions prior to the 1976 Copyright Act. It provides no talismanic solutions; it produces results which vary according to a great many factors which must be assessed differently with different types of use. It also inevitably requires difficult judgments, thereby increasing the risks of misuse. This is hardly surprising in an area that is "the most

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144. *Elsemere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980), *aff'd* 482 F. Supp. 741 (S.D.N.Y. 1980).

145. 23 F. Supp. 302 (E.D. Pa. 1938).

146. Censorship is no stranger to copyright law. In the first English translation case, *Burnett v. Chetwood*, 35 Eng. Rep. 1008 (1720), an injunction was granted against publication of defendant's translation of a work in Latin because it "contain[ed] strange notions intended by the author to be concealed from the vulgar in the Latin language, in which language could not do much hurt, the learned being better able to judge of it." *Id.* at 1009.

147. The danger of censorship interfering in this way seems to have been realized. *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981) involved a parody ("Cunnilingus Champion of Company C") of plaintiff's copyrighted song ("Boogie Woogie Bugle Boy of Company B"). Judge Von Graafeiland wrote for the majority, *inter alia*: "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for a commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society." *Id.* at 185. In dissent, Judge Mansfield responded: "We cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances. Obscenity or pornography play no part in this case." *Id.* at 191. The case was decided under the 1976 Copyright Act; under prior fair use law it might have been decided differently.

troublesome in the whole law of copyright."<sup>148</sup>

## II. FAIR USE IN THE 1976 COPYRIGHT ACT

### A. *Legislative History of Section 107*

In 1961, the Honorable Abraham Kaminstein, then Register of Copyright, recommended in his report to Congress<sup>149</sup> that the revised copyright statute upon which work was then commencing "should include a provision affirming and indicating the scope of the principle that fair use does not infringe the copyright owner's rights."<sup>150</sup> There was very little opposition to such inclusion at that time, nor has there been since.<sup>151</sup> Indeed it was generally agreed that, as the Register's Report argued, it would be "anomalous to have the statute specify the rights of copyright owners in absolute terms without indicating that those rights are subject to the limitation of fair use."<sup>152</sup> The new copyright statute was to be the first in the United States expressly recognizing the judicially created doctrine of fair use.

At no time during the consideration of the statute was there any serious argument that in the fair use provision any attempt should be made to change or reform the judicial doctrine. The Register's statement that "[t]he intention of section 107 is to give statutory affirmation to the present judicial doctrine, not to change it"<sup>153</sup> was accepted without disagreement. There was, however, considerable disagreement as to how the doctrine should

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148. *Dellar v. Samuel Goldwyn*, 104 F.2d 661, 662 (2d Cir. 1939).

149. See 1961 REGISTER'S REPORT, *supra* note 28. This draft was preceded by Professor Latman's comprehensive report, see Latman, *Fair Use of Copyrighted Works*, *supra* note 22, which was the fourteenth of a series of studies of various aspects of copyright law. *Id.* See also A. LATMAN & J. LIGHTSTONE, THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT (1981).

150. 1961 REGISTER'S REPORT, *supra* note 28, at 25.

151. Philip Wattenberg, for the Music Publishers Association, argued to the contrary: "If this provision is included it will mean tests of innumerable uses, some of which will be uneconomical to test, so that you will find rights being waived by inactivity." COPYRIGHT LAW REVISION—PART 2, 88TH CONG., 1ST SESS., DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 399-401 (Comm. Print 1963). Note that despite its stated point the argument opposes defining fair use in the statute rather than merely recognizing it.

152. 1961 REGISTER'S REPORT, *supra* note 28, at 25.

153. COPYRIGHT LAW REVISION—PART 6, 89TH CONG., 1ST SESS., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAWS: 1965 REVISION BILL 28 (Comm. Print 1965).

be enacted in the statute. Should the statute merely state the existence of fair use or should it include a definition? How could fair use be defined?

The first of these questions was initially and finally resolved in favor of including guidelines, if not a genuine definition.<sup>154</sup> In his 1961 Report, the Register included a list of "examples of the kinds of uses that may be permitted under [the] concept,"<sup>155</sup> and wrote:

Whether any particular use of a copyrighted work constitutes a fair use rather than an infringement of copyright has been said to depend upon (1) the purpose of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (4) the effect of the use on the copyright owner's potential market for his work.<sup>156</sup>

This preliminary suggestion was adopted as the basis of the first answer to the question of content.<sup>157</sup> In 1964 it was modified to include a list of examples of the kinds of uses contemplated.<sup>158</sup>

154. It has long been acknowledged that formulating a determinate definition of fair use is impossible. See, e.g., 1976 HOUSE REPORT, *supra* note 13, at 65. This rests on an expectation of more in such a definition than the nature of the subject matter permits. See *supra* text accompanying notes 24-32. But this difference, however, is merely verbal.

155. 1961 REGISTER'S REPORT, *supra* note 28, at 24. See *supra* text accompanying note 28.

156. 1961 REGISTER'S REPORT, *supra* note 28, at 24.

157. See COPYRIGHT LAW REVISION—PART 3—PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW § 6 (1964):

§6. LIMITATIONS ON EXCLUSIVE RIGHTS: FAIR USE. All of the exclusive rights specified in section 5 shall be limited by the privilege of making fair use of copyrighted work. In determining whether, under the circumstances in any particular case, the use of a copyrighted work constitutes a fair use rather than an infringement of copyright, the following factors, among others, shall be considered: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use upon the potential value of the copyrighted work.

158. Three identical versions of the 1964 revision bill were introduced: S. 3008, 88th Cong., 1st Sess. (1964); H.R. 11,947, 88th Cong., 2d Sess. (1964); H.R. 12,354, 88th Cong., 2d Sess. (1964). All of these included the following provision:

§ 6. LIMITATIONS ON EXCLUSIVE RIGHTS: FAIR USE.

Notwithstanding the provisions of section 5, the fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In determining whether the use made of work in any particular case is a fair use, the factors to be considered shall include:

(1) the purpose and character of the use;

There followed an interesting debate between those who would keep this definition or a modified version of it in the statute and those who would have no definition. Opposed to the definition were publishers (both of books and of music), newspapers, the presses, authors, composers, the Patent Law Association, the American Bar Association, publishers of educational materials, and a record manufacturer.<sup>159</sup> They argued that a definition could not be fair and equitable, would destroy the flexibility inherent in the judicial doctrine, and might well change (i.e., broaden) the effective scope of the fair use privilege.<sup>160</sup> In 1965 their arguments prevailed and the third draft of the fair use provision read: "Sec. 107. Limitations on exclusive rights: Fair use[.] Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright."<sup>161</sup>

The debate, however, continued. In favor of an elaboration of the fair use provision were scholars, educational television, educators, the General Services Administration, and the International Brotherhood of Electrical Workers.<sup>162</sup> It would appear that some on this side of the argument sought a definition for the purpose of including a special provision for their interests rather than for any intrinsic value it might have.<sup>163</sup> Others, however, argued for definitional guidelines on the basis of the need for certainty.<sup>164</sup> "[A] number of witnesses representing various educational and schol-

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(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

159. See generally COPYRIGHT LAW REVISION —PART 5, 89TH CONG., 1ST SESS., 1964 REVISION BILL WITH DISCUSSION AND COMMENTS 33-345 (1965).

160. *Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831, 6835 Before Subcommittee No. 3 of the Comm. on the Judiciary*, 89th Cong., 1st Sess., 1673, 1674 (1965) (statement of Harry F. Howard, for Book Mfrs. Inst.); *id.* at 66, 70, 75-76 (statement of Lee Deighton, for American Textbook Publishers Inst.); *id.*, 1215, 1216 (statement of Mark Carroll for Association of Am. Univ. Presses).

161. S. 1006, H.R. 5680, H.R. 6831, H.R. 6835 (identical bills), 89th Cong., 1st Sess. (1965).

162. *Hearings*, *supra* note 160, at 1554-55 (statement of Frederick Burkhardt for American Council of Learned Soc'ys); *id.* at 1906 (statement of Gordon M. Freeman, President, International Bhd. of Elec. Workers).

163. See, e.g., *id.* at 488-89 (testimony of Eugene L. Aleinikoff, Chairman, for Joint Nat'l Educ. Television—Educ. Television Stations Music and Copyright Comm.); *id.* at 1112-14 (statement of Lawson B. Knott, Jr., General Servs. Admin.).

164. See *supra* note 162.

arly organizations criticized the [1965] provision as vague and nebulous, and stressed the need of teachers and scholars to be certain whether what they were doing constituted fair use or infringement."<sup>165</sup> This argument prevailed. In 1966 the fair use provision was restored to the detailed form of 1964, differing from the present statute only in its lack of the two express references to educational uses.<sup>166</sup>

The draft statute remained unchanged from 1966 through to 1976 when educators<sup>167</sup> succeeded in having the parenthetical "(including multiple copies for classroom use)" included in the first sentence of section 107 and the tag "including whether such purpose is of a commercial nature or is for nonprofit educational purposes" added to subsection one. In this form the fair use provision of the 1976 Copyright Act became law.<sup>168</sup> With this vehicle Congress sought "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."<sup>169</sup> Did it succeed?

165. H.R. REP. NO. 83, 90th Cong., 1st Sess. 30 (1967).

166. H.R. 4347, 89th Cong., 2d Sess. (1966):

§ 107 LIMITATIONS ON EXCLUSIVE RIGHTS: FAIR USE.

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include-

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The 1967 version, H.R. 2512, 90th Cong., 1st Sess. (1967), changed only the dash before subsection 107(1), replacing it with a colon. The dash eventually found its way back. See 17 U.S.C. § 107 (1982).

167. See *Hearings, Before Subcomm. on Courts, Civil Liberties, and Administration of Justice*, 94th Cong., 1st Sess., 276-78 (1975) (testimony of Bernard J. Freitag for Nat'l Educ. Ass'n); *id.* at 291-92 (statement of Robert F. Hogan, Nat'l Council of Teachers of English).

168. See *supra* text accompanying notes 10-12.

169. 1976 HOUSE REPORT, *supra* note 13, at 66; 1975 SENATE REPORT, *supra* note 12, at 62.

## B. *The Form of Section 107*

Professor Latman has very clearly and concisely analyzed the form of section 107.

[T]his provision has three parts to it: (1) a conclusory statement that "fair use . . . is not an infringement of copyright"; (2) an illustrative list of the purposes of uses which may be included within the exemption; and (3) an illustrative list of the *factors* or criteria to be used in making the pertinent determination.<sup>170</sup>

The first sentence of section 107 also contains the language "including such use by reproduction in copies or phonorecords or by any other means specified by [section 106] . . . ." This language is essentially interstitial, serving only to emphasize that the kinds of use contemplated are not limited by the (then) present technology.<sup>171</sup> For present purposes the crucial elements are the list of illustrative purposes in the first sentence of section 107 and the numbered list of criteria which comprise the second sentence.

Discussions of the fair use defense tend to move directly to the numbered criteria with little more than a cursory mention of the first sentence of section 107.<sup>172</sup> This omission is in error. Congress included the list of exemplary purposes in section 107 with serious intent, and no court or commentator should overlook it. A justification for the neglect of the first sentence is suggested by one commentator.<sup>173</sup> The 1976 House Report includes: "These criteria are relevant in determining whether the basic doctrine of fair use, as stated in the first sentence of section 107, applies in a particular case . . . ."<sup>174</sup> One is tempted accordingly to treat the

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170. A. LATMAN, *THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 204* (5th ed. 1979).

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[T]he reference to fair use "by reproduction in copies or phonorecords or by any other means" is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use.

1976 HOUSE REPORT, *supra* note 13, at 66.

172. E.g., Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 STAN. L. REV. 243, 254 (1979); Note, *Copyright: Gone with the Betamax?* 8 N.Y.U. REV. L. & SOC. CHANGE 45, 52 (1978-1979).

173. Note, *Universal City Studios, Inc. v. Sony Corp.: "Fair Use" Looks Different on Videotape*, 66 VA. L. REV. 1005, 1013 (1980).

174. 1976 HOUSE REPORT, *supra* note 13, at 65.

first sentence as nothing more than "a conclusory statement that 'fair use . . . is not an infringement of copyright' "<sup>175</sup> with the second sentence's enumerated factors being the determinants of its application. Such treatment would be too hasty.<sup>176</sup>

Suppose a defendant literary critic in an infringement action raises the defense of fair use. His use of the plaintiff's copyrighted work in a critical essay is clearly within the purposes contemplated in the first sentence of section 107, and the issue remaining is whether it fulfills one of the criteria enumerated in the second sentence. However, should the defendant make photocopies of the plaintiff's work to distribute as Christmas gifts, his or her use of the copyrighted work clearly would not be within the purposes contemplated in the first sentence of section 107. If the analysis of this latter hypothetical proceeded to a consideration of the criteria enumerated in the second sentence, then the list of purposes in the first sentence would be mere surplusage.

Congress intended section 107 to restate the judicial doctrine of fair use.<sup>177</sup> If this intent is to be effectuated, the list of appropriate fair use purposes in section 107's first sentence cannot be ignored. If Congress had been entirely successful, then reconsideration under section 107 of prior cases involving the defense of fair use should "affirm" the original holdings. But if such an analysis rests solely on the second sentence's enumerated criteria, this will not necessarily follow.

Consider *Henry Holt & Co.*,<sup>178</sup> the case in which defendant unsuccessfully argued that the use in an advertising pamphlet of three sentences from plaintiff's treatise on the human voice was fair use. Analyzed just on the basis of the four criteria enumerated in the second sentence of section 107, the case should have resulted in a finding of fair use: the fact that the second use was for a commercial purpose<sup>179</sup> is not dispositive,<sup>180</sup> and the nature of

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175. See *supra* text accompanying note 170.

176. It should also be obvious that a statement of the basic doctrine of fair use is not the same as a statement that the doctrine is recognized.

177. The Supreme Court has explained, however: "We have already decided that the 'customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance' cannot be taken at face value." *Maine v. Thiboutot*, 448 U.S. 1, 8 n.5 (1980) (quoting *United States v. Price*, 383 U.S. 787, 803 (1966)).

178. 23 F. Supp. 302 (E.D. Pa. 1938); see *supra* text accompanying notes 145-47.

179. 17 U.S.C. § 107(1) (1982).

180. See *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171



the copyrighted work seems to be of little consequence;<sup>181</sup> "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"<sup>182</sup> was minuscule; and "the effect of the use on the potential market for or value of the copyrighted work,"<sup>183</sup> although alleged by plaintiff to be relevant, was in fact insignificant. Only by resort to the first sentence's list of purposes can this case be reconciled with section 107.

Since the enactment of section 107, most cases decided under it have been either relatively clear or have, properly, used the whole section. There have, however, been decisions based exclusively on section 107's four factors; these cases would have been decided the same way under prior law, but would have followed a different and more certain path to that result. Such decisions are troublesome in view of the need for certainty, which was an important consideration in Congress's opting for the inclusion of guidelines in the fair use section.<sup>184</sup> Subsections one through four each present a question of fact. While the first three are ordinarily quite readily resolved, the fourth, which is usually considered the most important,<sup>185</sup> presents very difficult problems of proof and judgment. Thus, the possibility of prevailing by summary judgment, even in a relatively clear case, is significantly diminished.<sup>186</sup>

The converse situation presents perhaps greater potential for spurious exploitation. A defendant who has clearly infringed and would be likely to lose a summary judgment can raise the defense of fair use. Merely because they are "factors to be considered," many courts feel compelled to apply subsections one through four at trial. Since the burden of proof on section 107(4) rests on the

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(5th Cir. 1980).

181. See 17 U.S.C. § 107(2) (1982).

182. See *id.* at § 107(3).

183. See *id.* at § 107(4).

184. See *supra* text accompanying notes 164-65; see also Chaffee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 514-15 (1945).

185. See 3 M. NIMMER, *supra* note 41, § 13.05[A](4).

186. This can be of peculiar significance in copyright actions. Consider, for example, the successful first novelist who must defend a spurious infringement action (suppose he quoted a couple of sentences from plaintiff's work). The author's contract with the publisher is likely to require the author to pay all costs of litigation, and to allow the publisher to withhold royalties during litigation. If he or she cannot win on summary judgment, such an author, even though successful, could get very hungry *pendente lite*, and perhaps have to suspend work on a second novel. The author might therefore be forced to settle. *But see* *Suid v. Newsweek Magazine*, 503 F. Supp. 146 (D.D.C. 1980).

plaintiff, the expense of trial is likely to force an unwarranted settlement rather than a disposition on the merits.<sup>187</sup>

*Iowa State Research Foundation, Inc. v. American Broadcasting Cos.*<sup>188</sup> is illustrative, with a plaintiff determined enough to pursue its cause through trial and appeal.<sup>189</sup> A student at Iowa State University had made a film biography of a champion wrestler, the copyright of which was held by the plaintiff; the defendant used segments of this work in a background television film during its coverage of the 1972 Olympic Games. The appellate court<sup>190</sup> analyzed the four factors of section 107 before rejecting the fair use defense. Under prior law, the fair use defense would not have been contemplated at all; this was a use for the same intrinsic function as plaintiff's work and did not serve to "promote the progress of science" in an independent way. The case is notable for its rejection of defendant's argument that it had achieved this constitutional goal by increasing the dissemination of plaintiff's work.<sup>191</sup> The point here is that it should not have been necessary for plaintiff to incur the expense and difficulty of this full procedure. A case involving an even more egregious infringement is *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co.*<sup>192</sup> In 1977, plaintiff, an architectural and engineering firm, had produced plans for an apartment complex built by defendant; in 1980, when defendant decided to build another such complex, it used the same plans, a clear infringement of plaintiff's copyright. Defendant raised the fair use defense and plaintiff won at trial. No common law precedent vaguely supported the fair use defense in this instance. Yet once the defense was raised, the invitation to make the factual determinations required under subsections one through four was compelling enough to precipitate a trial.

The problem is not in the factual nature of subsections one through four; fair use, after all, is a question of fact.<sup>193</sup> The problem, rather, is that the factual determinations to be made under the four factors are directed almost exclusively to the effect the

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187. Mr. Wattenberg's fears may well have been justified. See *supra* note 151.

188. 621 F.2d 57 (2d Cir. 1980), *aff'g* 463 F. Supp. 902 (S.D.N.Y. 1978).

189. Damages awarded totaled \$15,250 plus \$17,500 in attorney fees. 621 F.2d at 60.

190. *Id.* at 60-62.

191. *Id.*

192. 542 F. Supp. 252 (D. Neb. 1982).

193. *MCA, Inc. v. Wilson*, 677 F.2d at 183; *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

defendant's second use will have upon plaintiff and plaintiff's work. This placing of too exclusive a reliance upon these four factors results in a downplaying, even to the point of elimination, of the value of the second work to the promotion of "the progress of science."

At first glance it may appear that subsection 107(1), "the purpose and character of the use," is directed toward the constitutional purpose. However, the qualification that the court must consider "whether such use is of a commercial nature or is for nonprofit educational purposes" tends to belie this interpretation by indicating the kind of purpose and character intended in the first part of the subsection. Subsection two, "the nature of the copyrighted work," has the least prominence in the cases. Congress provided some help in the legislative history: "If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case . . ."<sup>194</sup> In most cases, however, this is not an important consideration.

Subsection three, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," does indeed spell out one of the consequences of the constitutional justification of fair use:<sup>195</sup> copying all, or substantially all, of a copyrighted work is, *prima facie*, not a fair use. The subsection is part of a non-exclusive and non-exhaustive list<sup>196</sup> of factors to be assessed in relation to each other and thus, like the common law rule, is rebuttable. It has proven significant only in rare cases.<sup>197</sup>

The general recognition of subsection four as the most important of the four factors<sup>198</sup> exacerbates the problem. Its prominence carries at least two important dangers. First, the harm that plaintiff suffers from defendant's use is, at least potentially, representable in dollar figures. Quantitative data of this kind is very

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194. 1975 SENATE REPORT, *supra* note 12, at 64. This factor is, however, of considerable importance in the *Betamax* decision. See *infra* note 297.

195. See *supra* text accompanying notes 125-44.

196. The use of the words "shall include" before subsections one through four unequivocally indicates Congress's intent that the list be non-exhaustive. Section 101 of the 1976 Copyright Act includes the stipulation: "The terms 'including' and 'such as' are illustrative and not limitative." 17 U.S.C. § 101 (1982).

197. *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 524 F. Supp. 252 (D. Neb. 1982); *Key Maps v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978).

198. 3 M. NIMMER, *supra* note 41, § 13.05[A](4); *Walker, supra* note 130, at 751.

persuasive, especially in the face of something so nebulous and unquantified as an increment in "the progress of science." Consequently, there will be a tendency to overvalue this data, and perhaps even to preclude the possibility of a fair use holding if *any* such harm is shown.

The second danger is interrelated. Subsection four focuses on the *potential* rather than the historical "market for or value of the copyrighted work."<sup>199</sup> In *DC Comics, Inc. v. Reel Fantasy, Inc.*,<sup>200</sup> defendant, a chain of comic-book shops, had used pictures of plaintiff's comic characters Batman and Green Arrow in its advertising flyers. The trial court found that plaintiff had shown no damage and thus granted defendant's fair use claim. The appeals court reversed because, *inter alia*, "one of the benefits of ownership of copyrighted material is the right to license its use for a fee."<sup>201</sup> Very few second uses are not, at least potentially, subject to licensing.<sup>202</sup> Carried to its extreme this argument would eliminate all but the most indispensable instances of fair use (e.g., book reviews, academic work).<sup>203</sup>

It is thus clear that focusing on the four enumerated factors of the second sentence of section 107 to the exclusion of the first sentence's list of examples does not capture the prior judicial doctrine of fair use. Thus, to this extent, such a focus thwarts Congress's intent. The remedy is far from obscure: the requirements of statutory construction, the constitutional justification, and the

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199. In terms of the constitutional basis of fair use, this may be a misdirected focus, not in its being on "potential," but in its being on plaintiff's work. As the risk to be defended against here is of damage to the economic incentive to authors, attention should be directed to the impact on the incentive to authors (generally) of works of the same kind as plaintiff's. See *supra* text accompanying note 138.

200. 539 F. Supp. 141 (S.D.N.Y. 1982), *rev'd*, 696 F.2d 24 (2d Cir. 1982) (the "Batman v. Batcave" case).

201. *D.C. Comics*, 696 F.2d at 28.

202. In *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court sub nom.* *Columbia Broadcasting Service, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958), the fact that Jack Benny had previously obtained a consensual license for a radio parody of the plaintiff's movie must have had some influence. Even parodies can be licensed.

203. The extreme has been approached in *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Prods.*, 479 F. Supp. 351 (N.D. Ga. 1979), in which the fair use defense was denied to the musical stage show "Scarlet Fever," featuring such characters as "Shady Charlotte O' Mara" and "Brett Studler." The court found that it was not a parody of plaintiff's *Gone with the Wind* and that the plaintiff might want to license such a stage show in the future. Perhaps Georgia is not a "world of unrelieved solemnity" like New York. See *Elsemere Music, Inc.*, 623 F.2d at 253.

effectuation of Congress's intention to preserve the judicial doctrine of fair use all make section 107's first sentence indispensable.

### C. *A Comprehensive Model of Section 107*

Accordingly, an adequate evaluation of a fair use defense will require a two-tier analysis. The first test is in the list of purposes in the first sentence of section 107: is the work containing the claimed fair use of a kind contemplated therein? Only if the answer is in the affirmative is the application of the numbered criteria of the second sentence of section 107 justifiable.<sup>204</sup>

Exactly how this first tier test is to be applied is not immediately clear. If the defendant's use is in "criticism, comment, news reporting, teaching . . . scholarship, or research" there will be no difficulty.<sup>205</sup> If the defendant's work does not fit within one of the specific listed categories,<sup>206</sup> then it remains to be determined whether or not the work fits within the general class of works of which the list is illustrative.<sup>207</sup> The rule of statutory interpretation known as *ejusdem generis*<sup>208</sup> guides this determination. "Under the rule of *ejusdem generis*, where general words follow an enumeration of specific items, the general words are read as applying to other items akin to those specifically enumerated."<sup>209</sup> The rule is "no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause . . . ."<sup>210</sup> These conditions seem amply satisfied here. However, the rule of *ejusdem generis* begs the question; what does it

204. Seltzer treats the list of examples in the first sentence of section 107 as irrelevant (or worse); see L. SELTZER, *supra* note 10, at 19, 21.

205. "[F]or purposes such as criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . ." 17 U.S.C. § 107 (1982).

206. There may, of course, be a question as to whether defendant's work is genuinely what he or she claims it to be. See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

207. It is not necessary to answer how the boundaries of that are class determined. A court faces only the easier task of deciding whether the particular use before it is in or not in the class. As with all such concepts clearer, yet always imprecise, boundaries develop as decisions accumulate.

208. Professor Nimmer raised the question of the application of this rule in his comments on the 1964 Copyright Revision Bill. See COPYRIGHT LAW REVISION—PART 5, 89TH CONG., 1ST SESS., 1964 REVISION BILL WITH DISCUSSION AND COMMENTS, 315-16 (Comm. Print 1965).

209. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980). See also *United States v. Turkette*, 452 U.S. 576, 581 (1980).

210. *Turkette*, 452 U.S. at 581; see *Harrison* 446 U.S. at 588.

mean for "other items" to be "akin to those specifically enumerated"? What are the determinants of kinship?

The list itself and its elaboration in the legislative history<sup>211</sup> contain the key. Both the list of purposes in the first sentence of section 107 and its elaboration in the legislative history have two striking and expectable features: all the items mentioned are typically of uses of part, but not all, of the primary work, and all the items mentioned are uses for purposes different from the purpose of the primary work.<sup>212</sup> Thus, the list of examples generates the two prima facie rules required by the constitutional analysis of fair use—rules which are satisfied in almost all pre-statute cases.<sup>213</sup>

In the list of examples in the first sentence of section 107, Congress has provided a set of categories of works which one can expect to "promote the progress of science" in a manner different from that of the primary use. The list is not exhaustive, but a defendant who claims a fair use of a kind not included in the list should have the burden of establishing that it does indeed satisfy this requirement.

There are cases which do not at first sight appear to fit this pattern. Such a case is *Rosemont Enterprises, Inc. v. Random House*,<sup>214</sup> which predates the 1976 Copyright Act. Defendant's work was a 304-page biography of a wealthy recluse, "Howard Hughes—A Biography by John Keats," published in 1966. The book included "[t]wo direct quotations and one eight-line paraphrase"<sup>215</sup> from plaintiff's series of three magazine articles entitled "The Howard Hughes Story," published in *Look* magazine in 1954. Plaintiff had been organized for the purpose of buying the copyrights to these articles and therewith preventing the publication of defendant's work. The district court had granted a prelim-

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211. 1976 HOUSE REPORT, *supra* note 13, at 65. Note that Congress includes parody or burlesque in its examples of fair use of copyrighted works. See 1961 REGISTER'S REPORT, *supra* note 28, at 24. They are omitted, however, from the first sentence of section 107. See 17 U.S.C. § 107 (1982). For a recent discussion of the fair use defense in parody cases, see Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395 (1984).

212. It is not difficult to come up with counter-examples to the latter. For instance, a literary critic might quote from a critical work of another literary critic. Such counter-examples, however, are essentially trivial.

213. See *supra* notes 125-44 and accompanying text.

214. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

215. *Rosemont*, 366 F.2d at 306.

inary injunction against publication.<sup>216</sup> The works were of the same kind—popular biography—and thus defendant's work served the same intrinsic function as plaintiff's work. The Court of Appeals, however, reversed,<sup>217</sup> reasoning that "balancing the equities" mandated that "the public interest should prevail over the possible damage to the copyright owner."<sup>218</sup>

*Key Maps, Inc. v. Pruitt*,<sup>219</sup> decided under the 1976 Copyright Act provisions, is another pertinent example. Pruitt was the Fire Marshall of Harris County, Texas. He had an engineer draw fire zones onto one of plaintiff's "major thoroughfare" maps to direct the responsibilities of the different fire departments. Plaintiff agreed to produce two hundred of the maps within ten days. After six weeks the project was not complete, so defendant made three hundred copies himself and distributed them as necessary. This second use was not only for the same intrinsic function as plaintiff's copyrighted work, it also was a copying of the entire primary work. Yet, the court found for the Fire Marshall.<sup>220</sup>

After balancing the exclusive rights of the copyright holder, *Key Maps*, with the public's interest in disseminating the maps to the various fire departments for fire prevention purposes, the Court opines that a privilege is created in the Defendants to use the copyrighted maps in a reasonable manner without the express consent of the Plaintiff.<sup>221</sup>

These are both variations on what might be called a "dog in the manger" theme.<sup>222</sup> If the defendant's use is for the same intrinsic purpose, or is a complete, or essentially complete, copying of plaintiff's work, and thus promotes the progress of science in

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216. *Rosemont Enters. v. Random House, Inc.*, 256 F. Supp. 55 (S.D.N.Y. 1966).

217. *Rosemont*, 366 F.2d at 303. The concurring judges noted their agreement with the fair use analysis of the majority opinion, but focused on the behavior of the plaintiff. An injunction is an equitable remedy and thus is not available to one who has not done equity. Note that although fair use is called "an equitable rule," see, e.g., 1975 SENATE REPORT, *supra* note 12, at 62, considerations of equity are not usually prominent in the cases. In the *Rosemont* concurrence their importance was keyed to the remedy sought—Howard Hughes was not interested in damages.

218. *Rosemont*, 366 F.2d at 309.

219. 470 F. Supp. 33 (S.D. Tex. 1978).

220. This must have been a close case, especially in view of the ease with which actual historical damages could have been calculated. The point here is the deliberate judicial overriding of the *prima facie* rules because of the public purpose—a purpose which must be unique in copyright law.

221. *Key Maps*, 470 F. Supp. at 38.

222. See, e.g. *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

the same way, a fair use might still be found if (a) the plaintiff would not or could not use his or her work to same effect as has the defendant, and (b) the harm to plaintiff is minimal. If a second use does achieve the constitutional purpose of promoting the progress of science, and if the circumstances of the use are so distinguishable from those of other cases that it would be "mechanical jurisprudence" to be bound by the rules developed in those cases, then why deny society the benefit of the use when the cost to the plaintiff is trivial? Howard Hughes did not want to exploit his biography himself; he wanted to keep it from being published. Since Key Maps did not—as it should have—perform when the public interest (in fire safety) was so vital, it should not have complained when defendant subsequently responded to the need in Key Map's stead by making the copies. Cases like *Key Maps*, however, are rare. The conditions for finding fair use in such cases must be stringent, lest rulings like *Key Maps* too easily engulf both fair use and copyright.

Except under these exceptional circumstances, a second use of copyrighted material must, if it is to qualify as a possible fair use, be for a purpose different from that of the first use and be such as will independently further the constitutional purpose of promoting the progress of science and the useful arts. Only if the work in question satisfies this requirement will it be appropriate to look to the other side of the balance: the impact of the second use on authors' incentives as measured by the detriment to the copyright owner's monopoly. This other side of the balance is the principal focus of subsections one through four of section 107.<sup>223</sup> Viewed from this perspective, Congress's intention to "endorse the purpose and general scope of the judicial doctrine of fair use, . . . not to change, narrow, or enlarge it in any way,"<sup>224</sup> is expressed adequately in section 107. Congress did indeed succeed in its aim. However, effectuating that success requires that serious attention be paid to the entire section and that significant use be

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223. The legislative history refers to this balancing as a balancing of equities: On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107.

1976 HOUSE REPORT, *supra* note 13, at 65.

224. *Id.* at 66.



made of each part. Using only the four factors of the second sentence of section 107 leads to results demonstrably at odds with Congress's stated intent.

The foregoing analysis covers the cases and the theoretical underpinnings of fair use up until the Supreme Court's decision in *Betamax*. The next section of this Article examines whether, in this single decision, the Court has demolished the entire edifice.

### III. THE *Betamax* CASE AND ITS IMPACT ON FAIR USE

On January 17, 1984, a slim majority of the United States Supreme Court held in the *Betamax* case, *inter alia*, that the use of a home video tape recorder ("VTR") for time-shifting is a fair use and thus not an infringement of copyright.<sup>225</sup>

Time-shifting with a VTR typically involves one hundred percent copying and use for the same intrinsic purpose as the primary work. Insofar as time-shifting serves to promote the progress of science, it does so only by increasing the dissemination of the primary work. It is thus in violation of the two *prima facie* rules of the judicial doctrine and its codification in section 107.

Clearly, then, the Supreme Court's opinion in *Betamax* presents some problems for the model of fair use analysis set forth in Parts I and II above. Does the opinion revise traditional fair use analysis? Does it render the model presented above entirely obsolete? Can the view of the Supreme Court majority be reconciled with this model?<sup>226</sup>

Before *Betamax*, the Supreme Court had never given its opinion on a question of fair use.<sup>227</sup> Thus, there is no prior authority of similar weight to help answer the questions above. The problem is further exacerbated by the fact that the dissenting opinion, for the most part, follows exactly the model presented in Parts I and II above. Thus, maintaining the viability of the model appears to be a problem of reconciling the majority and dissenting opinions.

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225. *Betamax*, 104 S. Ct. at 789-96.

226. Justice Blackmun, dissenting, thinks it cannot. "It is my view that the Court's approach alters dramatically the doctrines of fair use and contributory infringement as they have been developed by Congress and the courts. . . . [T]he decision today erodes much of the coherence that these doctrines have struggled to achieve." *Betamax*, 104 S. Ct. at 815.

227. See *id.* at 806 (Blackmun, Marshall, Powell, Rehnquist, JJ., dissenting).

In this Section, the *Betamax* opinions will be outlined with only marginal comments. An attempt will then be made to fit the majority opinion into the natural development of the prior law, and thus to bring out and ameliorate the critical points of disagreement in the two opinions. Since the "rule" thus developed has great potential for overuse, an attempt will be made to delimit clearly its domain. In conclusion, two ancillary aspects of the opinions will be noted: the analysis of the burden of proof under section 107, and the apparent invitation to Congress to modify the Court's decision.

#### A. *The Supreme Court Opinions*

Justice Stevens (joined by Chief Justice Burger and Justices Brennan, White, and O'Connor), writing for the majority, reversed the order of argument that had become typical in the commentaries and in the briefs. Plaintiffs sought no relief against any actual users of VTRs;<sup>228</sup> defendants, who were manufacturers and suppliers of VTRs, could be liable, if at all, only on a theory of contributory infringement.<sup>229</sup> The theory of contributory infringement has been better developed in the law of patents<sup>230</sup> than it has in the law of copyright. In patent law and now, clearly, in copyright law if there is a substantial noninfringing use for the device, then there is no contributory infringement. "[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."<sup>231</sup> The

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228. *See id.*, at 785.

229. *See id.*

230. *See, e.g.*, H. FORMAN, *PATENTS, RESEARCH AND MANAGEMENT* 378-86 (1961); R. HOAR, *PATENT TACTICS AND LAW* § 14-10 (1950); Lourie, *Contributory and Active Inducement of Infringement in Wake of Rohm and Hass Company v. Dawson Chemical Company*, in *INFRINGEMENT OF PATENTS* 165 (1981) (Practising L. Inst., Course Handbook Series, No. 132). The Supreme Court opinions agree as to most of this aspect of copyright law and have provided it with a clear articulation not before available.

231. *Betamax*, 104 S. Ct. at 789. Notice that the dissent essentially agreed: "If virtually all of the product's use . . . is to infringe, contributory liability may be imposed; if no one would buy the product for noninfringing purposes alone, it is clear that the manufacturer is purposely profiting from the infringement, and that liability is appropriately imposed." *Id.* at 814. However, the dissent then reversed its emphasis: "The key question is not the amount of television programming that is copyrighted, but rather the amount of VTR usage that is infringing." *Id.* Given the facts before the court, this should not have made a

issue thus is whether or not there is a substantial noninfringing use for VTRs.

In *Betamax* it was not necessary to decide how great a use had to be before a court would consider it to be substantial; the facts before the Court revealed that the predominant use to which owners put their VTRs was time-shifting.<sup>232</sup> Time-shifting was carefully defined as "the practice of recording a program to view it once at a later time, and thereafter erasing it."<sup>233</sup> The critical question thus becomes whether or not time-shifting is an infringement of copyright. It is important to note that with respect to copyright infringement the majority opinion addressed no other question.

Some owners of copyrights in works broadcast on television have no objection to, and even welcome, time-shifting.<sup>234</sup> Accordingly, time-shift copying of those works is not an infringement.<sup>235</sup> On this point the dissent may well have been right in asserting that the majority confused liability and remedy,<sup>236</sup> but this part of the argument is of no relevance to the issue at hand. What is critical is the majority's finding that time-shifting by VTR is a fair use.<sup>237</sup>

Justice Stevens begins the fair use analysis with the four enumerated factors of section 107.<sup>238</sup> The first factor, subsection one, glossed as "the commercial or nonprofit character of the activity,"<sup>239</sup> is of discriminatory importance. If the second use is for commercial purposes it is "presumptively an unfair exploitation,"<sup>240</sup> and the burden will be on the defendant to show that the copyright owner suffers no harm or potential harm.<sup>241</sup> If, on the other hand, the second use is noncommercial, the burden is on

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difference.

232. *Id.* at 779. Throughout this opinion, Justice Stevens took great care to address factual questions solely on the basis of the facts found at trial.

233. *Id.*

234. *Id.* at 789-91.

235. *See id.*

236. *See id.* at 815 (Blackmun, J., dissenting).

237. *See id.* at 791-95.

238. *See id.* at 792-93.

239. *Id.* at 792 (borrowing language from the 1976 HOUSE REPORT, *supra* note 13, at 66).

240. *Betamax*, 104 S. Ct. at 793. For an economic justification of this basic distinction, see Cirace, *supra* note 52.

241. *Id.*

the copyright owner to prove "either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."<sup>242</sup> In this case "the District Court's findings plainly establish that time-shifting for private home use must be characterized as a non-commercial, nonprofit activity."<sup>243</sup>

This, ultimately, was where the plaintiffs failed. They convinced neither the trial judge (whose responsibility it was to make this factual determination) nor a majority of the Supreme Court that time-shifting caused them actual or potential harm.<sup>244</sup> Thus, under subsection four, "respondents failed to carry their burden with regard to home time-shifting."<sup>245</sup>

With respect to subsections two and three, Justice Stevens wrote:

[W]hen one considers the nature of a televised copyrighted audiovisual work and that timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced does not have its ordinary effect of militating against a finding of fair use.<sup>246</sup>

For present purposes, this is the most crucial sentence in the majority opinion. What, for example, is the distinguishing "nature of a televised copyrighted audiovisual work?"

The majority addressed—but did not emphasize—the constitutional purpose element of the fair use balance.<sup>247</sup> The Court recognized that the only conceivable benefit to the promotion of the "progress of science" accruing from the use of VTRs is the increased dissemination of the copyrighted work. "[T]o the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits."<sup>248</sup> In this way, a majority of the Court was able to find that home time-shifting is fair use, not an infringement of plaintiffs' copyrights: "When these factors are all weighed in the 'equitable rule of reason' balance, we must conclude that this record amply supports the District Court's conclu-

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242. *Id.*

243. *Id.* at 792.

244. *Id.* at 793.

245. *Id.*

246. *Id.* at 792-93 (citations omitted) (citing 17 U.S.C. § 107(2), (3) (1982)).

247. *See id.* at 795.

248. *Id.*

sion that home time-shifting is fair use."<sup>249</sup> Reiterating the factual and statutory bases of its decision, the majority invited Congress to address the phenomenon of VTR usage.<sup>250</sup>

Justice Blackmun, joined by Justices Marshall, Powell and Rehnquist, in dissent, followed a more conventional analytic approach. The first question Blackmun addressed was whether home use of a VTR is copying under section 106 of the 1976 Copyright Act; only after a determination is made that VTR usage is copying must the issue of fair use arise, and only on resolving the fair use question in the negative does the opinion reach the issue of contributory infringement.

The question of whether or not home copying by VTR is copying arose in the literature—and in the district court opinion<sup>251</sup>—because in the legislative history of the 1971 Sound Recording Amendment<sup>252</sup> there was an apparent acceptance of an exemption for home tape recording of audio broadcast copyrighted work.<sup>253</sup> The argument was never very convincing, especially as the critical portions of that legislative history were not incorporated into the legislative history of the 1976 Copyright Act.<sup>254</sup> Justice Blackmun thus accurately concluded that no "implied exemption" under section 106 was applicable "to cover the home taping of television programs, whether it be for a single copy, for private use, or for home use."<sup>255</sup> There is no reason to believe that the majority would disagree.<sup>256</sup>

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249. *Id.*

250.

It may well be that Congress will take a fresh look at this new technology, just as it has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed.

*Id.*

251. See 480 F. Supp. at 444-46.

252. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391, 1971 U.S. CODE CONG. & AD. NEWS 417.

253. H.R. REP. NO. 487, 92d Cong., 1st Sess. 7-8, reprinted in 1971 U.S. CODE CONG. & AD. NEWS 1566, 1572 (1971); *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927 Before Subcomm. No. 3 of the House Judiciary Comm.*, 92d Cong., 1st Sess., 22-23 (1971).

254. See 3 M. NIMMER, *supra* note 41, § 13.05[F](5).

255. *Betamax*, 104 S. Ct. at 805-06 (Blackmun, J., dissenting).

256. This is one of the many indications that Justice Blackmun's opinion was originally written for a majority. Presumably, as a majority opinion, it would have had to address the

The dissent's treatment of fair use follows the model outlined in Parts I and II above very closely. The "common theme" of the listed items, Justice Blackmun wrote, is that "each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work."<sup>257</sup> Following Seltzer,<sup>258</sup> Justice Blackmun characterized this as a dual-risk approach, and stated it accurately in terms of authors' incentives.<sup>259</sup> The opinion then addressed the two *prima facie* rules developed above.<sup>260</sup> "[W]hen a user reproduces an entire work and uses it for its original purpose, with no added benefit to the public, the doctrine of fair use usually does not apply. There is no need whatsoever to provide the ordinary user with a fair use subsidy at the author's expense."<sup>261</sup> Nor did it matter to Justice Blackmun that the original television program was distributed free of direct charge; by analogy, "a book borrowed from the public library may not be copied any more freely than a book that is purchased."<sup>262</sup>

Justice Blackmun then turned to the four enumerated factors of section 107, beginning with subsection four—the one that he called "perhaps the most important."<sup>263</sup> He placed heavy emphasis on the *potential* effect of the second use in question.<sup>264</sup> Critical in the assessment of the potential harm is the nature and allocation of the burden of proof. In this respect, the dissent would differentiate productive and non-productive second uses: when the

question of such an implied exception, as it had been raised in the briefs and resolved wrongly by the district court.

257. *Betamax*, 104 S. Ct. at 807-08.

258. L. SELTZER, *supra* note 10, at 28.

259.

The fair use doctrine must strike a balance between the dual risks created by the copying system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others.

*Betamax*, 104 S. Ct. at 808 (Blackmun, J., dissenting). Here Justice Blackmun quotes in a footnote the famous passage from *Sayre v. Moore*, (K.B. 1785) (Mansfield, C.J.), 1 East 358, 361 n.(b), 102 Eng. Rep. 138, 139 n.(b) (1801). See *supra* note 141.

260. See *supra* text accompanying notes 127, 132.

261. *Betamax*, 104 S. Ct. at 808 (Blackmun, J., dissenting). The only exceptions acknowledged are the *de minimis* examples. See also *supra* notes 40-44 and accompanying text.

262. *Betamax*, 104 S. Ct. at 808 (Blackmun, J., dissenting).

263. *Id.* at 806.

264. Section four addresses "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4) (1982). In quoting it, Justice Blackmun italicized "potential." See *Betamax*, 104 S. Ct. at 809.

second use is not a productive one, the burden remains on the plaintiff, but it is a burden to "prove only a *potential* for harm to the market for or value of the copyrighted work."<sup>265</sup> How light this burden may be is then shown by a discussion of possible harm.

Although there may not be any actual harm demonstrated at trial, the fair use defense should fail if there is a "reasonable possibility" of such harm.<sup>266</sup> Although the *Betamax* dissent discussed plaintiffs' showing of potential harm, this discussion was not addressed specifically to time-shifting as defined by the majority.<sup>267</sup> The dissent also argued that time-shifting could reduce rerun audiences, and "consequently the license fees available to [the copyright owners] for repeated showings. Moreover, advertisers may be willing to pay for only "live" viewing audiences, if they believe VTR viewers will delete commercials or if rating services are unable to measure VTR use . . . ."<sup>268</sup> The dissent believed, therefore, that the plaintiffs had irrefutably sustained this burden. "The Studios have demonstrated a potential for harm, which has not been, and could not be, refuted at this early stage of technological development."<sup>269</sup>

The dissent makes clear what would be required of defendants to refute this demonstration of potential harm. "[T]he infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or deny access to)

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265. *Betamax*, 104 S. Ct. at 809 (Blackmun, J., dissenting) (emphasis supplied). Note that this is not wholly consistent with the argument made in a later section of the dissenting opinion that the rule against fair use for nonproductive second uses is absolute except in *de minimis* cases. See also *infra* notes 288-92 and accompanying text.

266. *Betamax*, 104 S. Ct. at 809 (Blackmun, J., dissenting).

267. The dissent explained that "[t]ime-shifting may raise the potential for substantial harm as well." *Id.* at 810. This damage was said to arise from "[a] VTR owner who has taped a favorite movie for repeated viewing . . . ." *Id.* at 810 n.35 (emphasis added). The majority did not address this issue.

268. *Id.* The rerun argument is truly baffling: Does a smaller first run audience mean a larger rerun audience? Do unpopular programs do better on reruns than popular programs? With respect to ratings, it was noted both by the district court, 480 F. Supp. at 441, 466, and by the majority, *Betamax*, 104 S. Ct. at 794 n.36, that ratings services can account for time-shifting. Whether time-shifters delete advertisements in significant numbers is a factual question; the survey data presented at trial indicated: "According to plaintiff's survey, 58.3% of the owners eliminate commercials from the recording either 'sometimes,' 'rarely,' or 'never'; 56.1% use the fast-forward to pass commercials either 'sometimes,' 'rarely,' or 'never.'" 480 F. Supp. at 439.

269. *Betamax*, 104 S. Ct. at 810 (Blackmun, J., dissenting). But see Cirace, *supra* note 52, at 663-67, 669-71, 682.

any group who would otherwise be willing to pay to see or hear the copyrighted work.”<sup>270</sup> This is a very extreme statement of the argument made in the “*Batman v. Batcave*” case<sup>271</sup> and criticized above.<sup>272</sup> If taken at face value, it would eliminate at least parody and burlesque from the list of traditional areas of fair use. The dissent argued that the *Betamax* defendants had failed to meet this requirement because the fact that home VTR users pay for the machines and video tapes demonstrates that they would be willing to pay a royalty for the privilege of time-shifting.

Justice Blackmun would reject per se any argument to the effect that increasing dissemination of a work is favorable to a copyright defendant. “[T]he fact that a given market for a copyrighted work would not be available to the copyright holder were it not for the infringer’s activities does not permit the infringer to exploit that market without compensating the copyright holder.”<sup>273</sup> This, too, was an important point of disagreement with the majority.

The dissent concluded that it would remand the case to the district court for a determination of the “ ‘percentage of legal versus illegal home-use recording.’ ”<sup>274</sup> It, too, invited Congressional action.<sup>275</sup>

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270. *Betamax*, 104 S. Ct. at 811 (Blackmun, J., dissenting).

271. *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24 (2d Cir. 1982); see *supra* text accompanying note 200.

272. See *supra* text accompanying notes 200-03.

273. *Betamax*, 104 S. Ct. at 811 (Blackmun, J., dissenting) (citing *Iowa State Univ. Research Found. v. American Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980)). See *supra* text accompanying notes 188-91.

274. *Betamax*, 104 S. Ct. at 815 (quoting the district court’s opinion, 480 F. Supp. at 468).

275. See *Betamax*, 104 S. Ct. at 819. One ought not finish a discussion of the Supreme Court opinions in *Betamax* without acknowledgement of the remarkable analysis of one student commentator; see Note, *supra* note 110. In this note, the author divides second uses on two different dimensions: “interactive” (corresponding to productive) versus “iterative” (unproductive, serving the same intrinsic purpose), and “commercial” versus “noncommercial.” The thesis is that only the iterative-commercial group should not be considered as possible fair uses. See *id.* at 462-63. The major difficulty is with the iterative-noncommercial group—and here the author’s argument is, ultimately, not convincing. However, the article is interesting in that it foreshadowed both of the Supreme Court opinions. The majority took the commercial-noncommercial dimension as fundamental, and the dissent took the iterative-interactive dimension as such.



## B. *The Betamax Decision and Prior Law*

Two cases discussed earlier<sup>276</sup> are of special value in relating the *Betamax* decision to prior case law: *Rosemont Enterprises, Inc. v. Random House, Inc.*,<sup>277</sup> a case decided before enactment of the 1976 Copyright Act, and *Key Maps, Inc. v. Pruitt*,<sup>278</sup> a case decided under section 107. The holdings of both these cases are inconsistent with the analysis of the *Betamax* dissent.<sup>279</sup>

First, in both cases the second use in question was for the same intrinsic purpose as the first use. In *Rosemont*, the defendant's biography was for the popular market, as were plaintiff's *Look* magazine articles.<sup>280</sup> In *Key Maps*, the defendant used plaintiff's map as a map, albeit modified, but in exactly the manner that plaintiff had agreed to supply.<sup>281</sup> Confronted with an absolute, per se rule against non-productive second uses such as that advocated by the *Betamax* dissent,<sup>282</sup> neither the *Rosemont* nor the *Key Maps* defendant could have successfully invoked the fair use defense.

In both *Rosemont* and *Key Maps* plaintiffs could have demanded compensation for the defendant's uses or denied access to their originals.<sup>283</sup> Indeed, in *Key Maps* compensation had previously been agreed to, and in *Rosemont* denying access was the whole point of plaintiff's action. Thus, under the principles advocated by the *Betamax* dissent, plaintiffs were clearly harmed, and thus under subsection four of section 107 the fair use defense would be denied. Moreover, in *Key Maps* not only was the defendant's use for the same intrinsic purpose, it was a use of one-hundred percent of plaintiff's original. Under the absolute, per se rule against one-hundred percent second uses that the dissent pro-

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276. See *supra* notes 214-22 and accompanying text.

277. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

278. 470 F. Supp. 33 (S.D. Tex. 1978).

279. See *supra* text accompanying notes 214-22.

280. See *Rosemont*, 336 F.2d at 306.

281. See *Key Maps*, 470 F. Supp. at 37.

282. See *Betamax*, 104 S. Ct. at 807-08, 816. It is useful here to adopt the distinction used in antitrust law between a per se rule (one which applies regardless of the relation of the particular facts to the rationale of the rule) and a rule of reason (one which applies only in case the particular facts accord with the rule's rationale). See, e.g., *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). The use of this distinction in copyright law has been advocated in Phelan, *The Continuing Battle with the Performing Rights Societies: The Per Se Rule, the Rule of Reason Standard, and Copyright Misuse*, 15 TEX. TECH. L. REV. 349 (1984).

283. Cf. *Betamax*, 104 S. Ct. at 811 (Blackmun, J., dissenting).

poses,<sup>284</sup> the defendant therefore could not succeed in the fair use defense. Finally, in both cases the markets satisfied by the defendants' second uses could not have had access to the primary works but for the claimed infringement. This, too, would have been ruled irrelevant in the view of the *Betamax* dissent.<sup>285</sup>

The *Betamax* majority, on the other hand, portrays fair use as an "equitable rule of reason"<sup>286</sup> and as being founded upon "a sensitive balancing of interests."<sup>287</sup> It thus rejects any attempt to introduce absolute, per se rules into the analysis.

The majority, nevertheless, does not neglect the "prima facie" rules developed above. First, as to the prohibition against non-productive second uses, the majority wrote:

The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative. Although copying to promote a scholarly endeavor certainly has a stronger claim to fair use than copying to avoid interrupting a poker game, the question is not simply two-dimensional. . . . [T]he notion of social "productivity" cannot be a complete answer to this analysis.<sup>288</sup>

As the majority pointed out, Congress itself provided a counterexample to the absoluteness of this rule: "Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or inform need motivate the copying."<sup>289</sup> Applying this reasoning to the *Rosemont* and *Key Maps* cases establishes clearly that defendants would not fail solely because their second uses were for a purpose not intrinsically different from the plaintiffs' primary works.

Second, as to the prohibition against one-hundred percent copying, the majority wrote:

[W]hen one considers the nature of a televised copyrighted audiovisual work, . . . and that timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced . . . does not have its *ordinary effect* of

284. See *id.* at 807-08, 816.

285. See *id.* at 811.

286. See *id.* at 792 (emphasis added).

287. *Id.* at 795 & n.40. The Court explains in terms of "[w]hen these factors are all weighed in the 'equitable rule of reason' balance . . . ." *Id.* at 795.

288. *Id.* at 795.

289. *Id.* The reference is to 1976 HOUSE REPORT, *supra* note 13, at 73.

militating against a finding of fair use.<sup>290</sup>

Distinguishing between time-shifting of "televised copyrighted audiovisual works" and ordinary one-hundred percent copying is thus of critical importance to determining the effect of the majority position.

In the passage quoted above, the majority mentioned one distinguishing feature: the fact that the person who time-shifts has previously been offered the work "in its entirety free of charge." This fact did not obtain in *Key Maps*; indeed, defendant had previously agreed to buy the maps from plaintiff.<sup>291</sup> Even had he not so agreed, he could easily have bought three hundred of the basic maps and modified each rather than copying his own modification of one.<sup>292</sup>

The second fact emphasized by the *Betamax* majority as distinguishing time-shifting from "ordinary copying" was that time-shifting is "a noncommercial, nonprofit activity."<sup>293</sup> Although the greatest impact of this may be with respect to the allocation of the burden of proof, under subsection four it is also relevant as a distinguishing factor. The dissent takes issue with it as such. "[T]ime-shifting is noncommercial in the same sense that stealing jewelry and wearing it—instead of reselling it—is noncommercial."<sup>294</sup> This misses the point: the time-shifter, unlike the jewel thief, deprives the owner of nothing.

It is difficult to characterize Fire Marshall Pruitt's activity in *Key Maps* within this commercial/noncommercial dimension. Certainly his copying was for a public purpose, not for private gain; on the other hand, he did deprive Key Maps of the profit obtainable from the market demand he filled. Probably the latter is the more serious aspect, as it pertains to the incentive side of the constitutional balance. Under the reasoning of the *Betamax* majority this factor, too, should have influenced the Court not to hold that Pruitt's use was fair.

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290. *Betamax*, 104 S. Ct. at 792-93 (footnote omitted, emphasis added).

291. *Key Maps*, 470 F. Supp. at 36-38.

292. The *Betamax* dissent rejected the relevance of this fact. "Although a television broadcast may be free to the viewer, this fact is equally irrelevant; a book borrowed from the public library may not be copied any more freely than a book that is purchased." *Betamax*, 104 S. Ct. at 808 (Blackmun, J., dissenting).

293. *Id.* at 792.

294. *Id.* at 816-17. (Blackmun, J., dissenting).

The fact that the *Betamax* plaintiffs failed to show any reduction in market or "meaningful likelihood of future harm"<sup>295</sup> is also very significant in distinguishing time-shifting. In the "ordinary" case of one-hundred percent copying, the effect is almost certainly going to be some present and demonstrable future harm to the copyright owner. In *Key Maps*, the actual historical damages were quite apparent; the possible future harm would have been, also apparently, zero. Under the unique circumstances of the case,<sup>296</sup> there could hardly be any negative impact on mapmakers' incentives.

The final factor distinguishing time-shifting from ordinary one-hundred percent copying is probably the most important: the time-shifter has no other way of viewing the copyrighted materials. "Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a broadcast they desire to watch."<sup>297</sup> Standing alone this factor may not appear significant; the fact that one cannot afford a book would not make photocopying it (should that be cheaper) a fair use. But when conjoined with the initial free distribution and the absence of harm to the copyright owner, the impossibility of otherwise viewing the copyrighted work is a very powerful reason for finding time-shifting to be fair use. This factor is critical to the *Key Maps* holding; within the short time frame imposed, reinforced by the pressing public need for modified maps, Pruitt had no alternative to making them himself.

It is clear that the majority in *Betamax* accepts both the prima facie rules of previous fair use analysis. However, it accepts them as "rules of reason," not as absolute or per se constraints on the application of the doctrine of fair use. The rules can be avoided only when the reasons upon which they are founded are not applicable. Justice Stevens spells out quite explicitly the facts which make those reasons inapplicable with respect to time-shifting.<sup>298</sup>

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295. *Id.* at 793. See also *id.* at 780-81. (Blackmun, J., dissenting).

296. The judge might well have been impressed by equitable considerations. *Key Maps* had breached its contract with Pruitt, but nevertheless was seeking to collect the profits it would have made had it performed, see 17 U.S.C. § 504(a) (1982), or possibly even more in statutory *in lieu* damages. See *id.* at § 504(c).

297. *Betamax*, 104 S. Ct. at 779.

298. See *id.* at 792-93.

One must also address the other side of the doctrinal balance by which the defense of fair use is weighed: the extent to which the use achieves the constitutional purpose of promoting the progress of science. The only way time-shifting fulfills this purpose is by increasing the dissemination of the copyrighted television broadcasts. The argument against permitting this is closely related to that for the *prima facie* rule against one-hundred percent copying. Thus, all of the features distinguishing time-shifting under that rule are equally significant here. In particular, a noncommercial second use with no "demonstrable effect upon the potential market for, or value of, the copyrighted work need not be prohibited,"<sup>299</sup> as it *ipso facto* would have no negative impact upon authors' incentives. Rather than further the constitutional purpose of copyright, "[t]he prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit."<sup>300</sup>

The *Betamax* dissent disagreed,<sup>301</sup> citing *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*<sup>302</sup> This reliance is misplaced. In that case the defendant did argue that it had made plaintiff's film available to millions who otherwise would not have seen it; however, plaintiff was also actively engaged in renting the film to organizations such as schools and wrestling clubs. Unlike the typical television broadcast, it was readily available at a price and would continue to be so.

Had the *Betamax* court been confronted with slightly different facts, the case might well have been decided differently. If, for example, videotapes of all television programs were made available by the networks through some rental system, or if they could be viewed later by a selective cable system, the majority analysis would be unjustifiable. But today's episode of "Another World" is not available after 3:00 p.m. today (and before tomorrow's episode) by any means other than time-shifting. This is quite different from the situation envisaged by the minority and from the facts in *Iowa State*.

*Key Maps* is distinctive for the unique and pressing public purpose of the defendant's use: firefighting. It is, nevertheless, a mar-

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299. See *supra* text accompanying notes 131-32.

300. *Betamax*, 104 S. Ct. at 793.

301. *Id.* at 811 (Blackmun, J., dissenting). See *supra* text accompanying note 274.

302. 621 F.2d 57 (2d Cir. 1980). See *supra* notes 188-91 and accompanying text.

ginal case. According to the reasoning of the *Betamax* majority, *Key Maps* was correctly decided but marginally so; under the reasoning of the *Betamax* dissent, it would have been unequivocally reversed. *Rosemont* is distinctive for the plaintiff's unusual motive: the denial of access to any published material about Howard Hughes. It, too, would have been upheld by the *Betamax* majority and reversed by the dissent.

Both *Betamax* opinions contain the formal elements of the model of prior fair use law outlined earlier in this Article, though the dissent is more explicit in following them. The key difference between the majority and dissent is in the approach to the prima facie rules of that model. To the majority, the rules are equitable rules of reason, to be followed when the reasons for them apply, but not to be followed slavishly when those reasons do not apply. To the dissent the prima facie rules are absolutes, per se rules to be applied in all but a specified few *de minimis* cases.<sup>303</sup>

### C. The Effect of the *Betamax* Decision

Thus the traditional doctrine of fair use survives the *Betamax* decision relatively unscathed. What the Supreme Court has re-emphasized is that the analysis must be used sensibly, with sensitivity to the facts of the particular case. The rules generated by the analysis are rules of reason.

Insofar as it has created an exception to the model, the *Betamax* opinion might best be described as anti-"dog in the manger." If the second use is of some benefit to society, and if the copyright owner is in no way harmed, actually or potentially, and if those who benefit from the second use would not otherwise have access to the copyrighted work, it would be foolish—indeed counter-productive—to deny the privilege of fair use. To find a defendant liable for infringement in such circumstances would be to condone the plaintiff copyright owner's "dog in the manger" behavior.

The most significant argument against this position is histori-

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303. In its recent analysis of price-fixing prohibitions, the Supreme Court recently reiterated the reasons for adopting per se rules. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343-44 (1981). That Justice Stevens, who authored the majority opinion, was also the author of the majority opinion in *Betamax*, indicates how firmly the Court holds that the prima facie rules of fair use are rules of reason, and not per se.

cal.<sup>304</sup> Three of the state statutes enacted between 1783 and 1790<sup>305</sup> had contemplated and made provision for just such circumstances.<sup>306</sup> The drafters of the first federal legislation, who undoubtedly were aware of these state statutes, rejected such a provision, and all subsequent Congressional revisions of the copyright statute followed suit. However, with the time that has passed since then, and the great changes in technology and the consequent increase in the variety of kinds of subject matter of copyright, it could hardly be said that the considerations relevant in 1790 were relevant for similar reasons in 1976. The relevance of the historical argument is, thus, doubtful.

The "mechanical jurisprudence" of the dissenting analysis in *Betamax* has the definite advantage of certainty.<sup>307</sup> Does the majority position sacrifice too much in this respect? Probably not. The certainty required of rules is only the certainty appropriate to their subject matter. As Justice Stevens noted, the subject matter of the fair use doctrine is tremendously diverse.<sup>308</sup> It would indeed be surprising if "the most troublesome [issue] in the whole law of copyright"<sup>309</sup> could be captured in a uniform and certain net. To be sure, the *Betamax* majority has done little to further the cause of certainty or to reduce the judicial burden in future fair use cases, but case-by-case analysis is exactly what is appropriate in the area of fair use.<sup>310</sup>

Since it is an apparent exception to a set of general rules, the *Betamax* decision, as Justice Blackmun commented in dissent, creates some risk of "erod[ing] much of the coherence that [fair use]

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304. See *supra* text accompanying notes 150-54.

305. See B. BUGBEE, *supra* note 16, at 104-24.

306. See *supra* note 131.

307. Certainty was included as Professor Chaffee's sixth criterion for copyright law. See Chaffee, *supra* note 184, at 514-15.

308.

[I]t is not true that all copyrights are fungible. Some copyrights govern material with broad potential secondary markets. Such material may well have a broader claim to protection because of the greater potential for commercial harm. Copying a news broadcast may have a stronger claim to fair use than copying a motion picture. And, of course, not all uses are fungible. Copying for commercial gain has a much weaker claim to fair use than copying for personal enrichment.

*Betamax*, 104 S. Ct. at 795 n.40.

309. *Dellar v. Samuel Goldwyn*, 104 F.2d 661, 662 (2d Cir. 1939). See *supra* text accompanying note 14.

310. See *supra* text accompanying notes 24-32.

doctrines have struggled to achieve."<sup>311</sup> If the majority's rationale is followed, there is no such risk; but there is such a risk if courts misinterpret the majority opinion as creating a new general rule. It would therefore be useful to find a general characterization of "the nature of a televised copyrighted audiovisual work"<sup>312</sup> that allows time-shifting to be fair use.

Prior to the Gutenberg revolution (starting in the mid-fifteenth century), there was no real need for copyright protection as we know it today.<sup>313</sup> Writings had great longevity, but very little distribution among the population. One might say writings were well distributed on a diachronic dimension, but had scarcely any distribution on a synchronic dimension. Copying by hand was simply too onerous.<sup>314</sup> A modern analogue may be found in paintings or sculptures. There is little need for copyright protection of such works in galleries unless they are mechanically copied in replicas such as postcards or statuettes for wide synchronic distribution.<sup>315</sup>

The typical television broadcast presents the converse. It has very great synchronic distribution: the copyright owner hopes to maximize his viewer audience. But it has very little diachronic distribution: once shown, it is no longer available. By way of contrast, a book is usually available at any time,<sup>316</sup> either by purchase or from a library.<sup>317</sup> This diachronic limitation of television broadcasts is especially relevant to serials (such as "soap operas") which the viewer wants to see, if at all, before the next episode, and to sports events which are not usually rerun.

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311. *Betamax*, 104 S. Ct. at 815.

312. *Id.* at 792.

313. *But see* "Finnian v. Columba," in MONTALEMBERT, *supra* note 41.

314. Nevertheless, Columba is said to have made "with his own hand three hundred copies of the Gospel or the Psalter." *See id.* at 118.

315. *See, e.g.,* American Tobacco Co. v. Werckmeister, 207 U.S. 284 (Day, Circuit Justice, 1907); Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n, 320 F. Supp. 1303 (N.D. Ill. 1970). *Cf.* Pushman v. New York Graphic Soc'y, 287 N.Y. 302, 39 N.E.2d 249 (1942). This is not to say that artists' claim to greater and more equitable compensation is without merit. *See generally* Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333 (1968).

316. If a book is not available, Congress tells us that the fair use privilege to copy it may be greater. *See* 1975 SENATE REPORT, *supra* note 12, at 64.

317. This distinction demonstrates the inaccuracy of the parallel Justice Blackmun drew between time-shifting and copying a book from a library. *See Betamax*, 104 S. Ct. at 808 (Blackmun, J., dissenting).



Time-shifting, as defined and examined in the *Betamax* case, is not a process of creating a substitute diachronic distribution; the majority did not address the issue of program librarying. It is a process of alleviating the very narrow diachronic distributional constraint characteristic of the medium.<sup>318</sup>

On this basis, one might characterize the *Betamax* exception as applicable only in those instances in which the copyrighted work has no extended distribution either on the synchronic or on the diachronic dimension. Historically, copyright protection has been unnecessary unless there was a possibility of extensive synchronic distribution.<sup>319</sup> The situations in which a copyrighted work lacks diachronic distribution must be very rare.<sup>320</sup>

#### D. *Betamax and the Burden of Proof*

Throughout this Article, fair use has been referred to as a defense. It has not always been clear that it is. "Fair use has been variously regarded as a 'defense,' as a 'privilege,' or as a use that is noninfringing."<sup>321</sup> The two *Betamax* opinions alleviate any remaining confusion.

Justice Blackmun, writing in dissent, stated explicitly that before reaching the question of fair use one must first find the appearance of a violation of "the exclusive right, granted in the first instance by § 106(1) . . . ."<sup>322</sup> In other words, one must first

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318. Accordingly, the dissent missed the point when it referred to taping "a favorite movie for repeated viewing . . . ." *Id.* at 810 n.35. The dissent's use of Professor Tribe's analogy of time-shifting and "stealing jewelry and wearing it," *id.* at 816-17, is similarly misguided; the appropriate analogue is to stopping and looking twice at the jewelry on the person wearing it.

319. This was the problem in *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), and *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978). In *Rosemont*, Howard Hughes could do nothing about the published *Look* magazine articles, but wanted to prevent any further synchronic distribution of material about him. In *Key Maps*, the plaintiff had, within the short time-frame required by the important public purpose, prevented the synchronic distribution needed.

320. It follows, as it should, that if television programs were to be made available diachronically, by some means such as were suggested above, *see supra* text accompanying note 302, time-shifting would no longer be fair use.

It should be noted that this distinction also removes the *Betamax* decision from the scope of the historical criticism. *See supra* text accompanying notes 305-07. The state legislatures in 1783-1790 and the first Congress were (and could only be) addressing problems in the synchronic dimension.

321. Gordon, *supra* note 52, at 1626 (footnotes omitted).

322. *Betamax*, 104 S. Ct. at 800 (Blackmun, J., dissenting).

find the appearance of an infringement.<sup>323</sup> The majority did not disagree; rather, it assumed that this rather obvious requirement had been satisfied.<sup>324</sup>

If the plaintiff can establish copying, he or she hardly can be expected or required further to allege and demonstrate, *prima facie*, facts sufficient to show that none of sections 107 through 118 apply. These issues are to be raised at the defendant's discretion.

Thus, fair use arises in litigation as an affirmative defense. Common sense and procedure permit no other stance. It would appear to follow that "[i]f fair use is viewed as a defense, or a form of excused infringement, the burden of proof lies with the defendant."<sup>325</sup> But one should not reach hasty conclusions on mere appearances. As Congress noted, "any special statutory provision placing the burden of proving fair use on one side or other would be unfair and undesirable."<sup>326</sup>

The allocation of burden of proof should vary with the different elements of the fair use defense.<sup>327</sup> If the burden were on defendant to show that plaintiff suffers no potential harm under subsection four, defendant will, in discovery, ascertain and refute all of the ways in which plaintiff thinks he or she may be harmed, thus shifting the burden back to plaintiff. Courts should not require such gratuitous formalities.

If defendant's use is of a kind listed in the first sentence of section 107,<sup>328</sup> he or she should have the benefit of a presumption that the use promotes the progress of science; so Congress seems to have intended. Plaintiff then has the burden of rebuttal.<sup>329</sup> If

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323. Section 501(a) defines infringement of copyright as the violation of "the exclusive rights of the copyright owner as provided by sections 106 through 118" of the 1976 Copyright Act. 17 U.S.C. § 501(a) (1982).

324. One must take care not to confuse the issues of copying and fair use. See *Betamax*, 104 S. Ct. at 777-78.

325. Marsh, *supra* note 56, at 57.

326. H.R. REP. NO. 83, 90th Cong., 1st Sess., 37 (1967). Marsh notes this but concludes that because Congress did not intend to change the prior law of fair use, the burden remains on the defendant. Marsh, *supra* note 56, at 57. It is questionable that the prior law was so unequivocal.

327. Should a formal argument be required one could note that section 106 is "[s]ubject to sections 107 through 118." 17 U.S.C. § 106 (1982). Thus, there appears to be a standoff between arguments for putting the burden on the plaintiff or the defendant. Common sense and reality should prevail.

328. This should include its expansion (in particular to cover parody) in the legislative history. See *supra* text accompanying note 28.

329. Plaintiff's rebuttal succeeded, for example, in *MCA, Inc. v. Wilson*, 677 F.2d 180

defendant's work is not on that list, he or she should have the burden of showing that, nevertheless, it does achieve this constitutional end.<sup>330</sup>

The critical issue—the issue on which the outcome of an action may very well hinge—is the burden of proof of “the effect of the use upon the potential market for or value of the copyrighted work” under subsection four. The statute does not clarify how courts should treat this issue, which hitherto has been the subject of much debate.<sup>331</sup> The Supreme Court in *Betamax* has resolved this dilemma.

A reasonable first reaction to this question is that the burden must be on plaintiff, since the facts and the imaginative incentive for such a proof are peculiar to him or her. Congress accepted this reasoning in its enactment of the first sale doctrine.<sup>332</sup> Previously, the burden had been on plaintiff to prove, in those instances in which he or she claimed not to have sold any copies of the copyrighted work, that “the allegedly infringing copies in the defendant's possession were not lawfully made or acquired . . . .”<sup>333</sup>

The Committee believes that the court's decision, if followed, would place a virtually impossible burden on copyright owners. The decision is also inconsistent with the established legal principle that the burden of proof should not be placed upon a litigant to establish facts particularly within the knowledge of his adversary.<sup>334</sup>

So also it appears to be with subsection four.<sup>335</sup>

The Supreme Court did not disagree; rather, it refined this allocation of the burden of proof with a precondition.

[A]lthough every *commercial* use of copyrighted material is presumptively an

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(2d Cir. 1981).

330. Professor Gordon would place this burden on the defendant regardless of whether the work is of a kind on section 107's list. Gordon, *supra* note 52, at 1625.

331. *Id.* at 1624.

332. 17 U.S.C. § 109 (1982).

333. 1976 HOUSE REPORT, *supra* note 13, at 80-81 (referring to *American Int'l Pictures, Inc. v. Foreman*, 400 F. Supp. 928 (S.D. Ala. 1975) *rev'd* 576 F.2d 661 (5th Cir. 1978)).

334. 1976 HOUSE REPORT, *supra* note 13, at 81.

335. Congress, however, despite a clear opportunity to do so, did not make this argument with respect to subsection 107(4). Perhaps this is because it addressed the question of burden of proof only as to section 107 as a whole and not as to its subparts. Note that in this respect subsection 107(4) is different from the remainder of section 107. See 17 U.S.C. § 107 (1982).

unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, *noncommercial* uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. . . . If the intended use is for commercial gain, [the likelihood of future harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.<sup>336</sup>

Thus, the burden of proof is on plaintiff, but if the use in question is commercial, plaintiff has the benefit of a presumption of harm satisfying subsection four.<sup>337</sup>

The *Betamax* dissent was consistent with this approach, but it would gear the burden of proof to whether or not the defendant's use was productive, lightening the burden when it is not. As Justice Blackmun would have it, "at least when the proposed use is an unproductive one, a copyright owner need prove only a *potential* for harm to the market for or the value of the copyright work."<sup>338</sup> This is apparently inconsistent with the elevation of the rule against fair use for nonproductive uses to per se status.<sup>339</sup> Nevertheless, it does not necessarily negate the majority position. If the second use is nonproductive (in the dissent's sense) but is within the *Betamax* rule-of-reason exception, the same rule will apply, subject only to the commercial/noncommercial refinement. The burden remains, mostly, on the plaintiff.

How heavy is that burden? The Supreme Court majority answered:

336. *Betamax*, 104 S. Ct. at 793 (emphasis added). The use of the words "should it become widespread" plainly accommodates both the *de minimis* cases, see *id.* at 793 n.34, and Congress's express fear: "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." 1975 SENATE REPORT, *supra* note 12, at 65.

337. This position is supported by Cirace's analysis. He argues that as long as the reproduction is not commercial, out of pocket and opportunity costs will always outweigh gain. Cirace, *supra* note 52, at 661-62. He argues further that a repayment to copyright owners by way of a tax or such like would not necessarily be to their benefit and could have an undesirable impact on their production patterns. *Id.* at 670-71. His analysis reminds us that externalities of both consumption and production are two-way streets. Note also that the majority's position quoted here would not have affected the outcome of *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1176 (5th Cir. 1980).

338. *Betamax*, 104 S. Ct. at 809 (Blackmun, J., dissenting) (emphasis in original). This may appear to take something away from the copyright owner, as subsection 107(4) refers to "potential" in all cases.

339. See *supra* text accompanying note 303.

Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.<sup>340</sup>

The dissent substituted "reasonable possibility" for "meaningful likelihood."<sup>341</sup> The dissent's elaboration of this difference reveals that it intends plaintiff's burden to be extremely light.<sup>342</sup> Perhaps "meaningful likelihood" is vague; could it be otherwise? The *Betamax* majority has indicated what it means by its treatment of the plaintiff's attempted proofs; the contrast with the dissent view highlights this meaning.

In summary, the burden of proof of fair use is divided in a reasonable and sensible manner between plaintiff and defendant. With respect to the critical problem of subsection four, the burden is on plaintiff, but the plaintiff has the benefit of a presumption of harm if the defendant's use is commercial. This approach accords with common sense and the realities of litigation.

#### E. *The Invitation to Congress*

Both the majority and dissenting opinions in *Betamax* invited Congress to look further at the question of home use of VTRs.<sup>343</sup> The implication is that the Court believes Congress could, if it so chose, change the law that decided the case. How exactly would Congress do this?

If Congress is satisfied with copyright law as it stands after *Betamax*, it will take no action, and those bills presently before Congress<sup>344</sup> that would simply exempt home video recording become irrelevant. If, on the other hand, Congress decides that the owners of copyrights in broadcast material should receive some compensation from home video (and audio) recorders, it must take some action.

Legislation has already been proposed which would exempt

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340. *Betamax*, 104 S. Ct. at 793 (emphasis in original).

341. *Id.* at 809 (Blackmun, J., dissenting).

342. See *supra* text accompanying notes 270-73 for an argument that the plaintiff's burden is made so light that it destroys many valued fair uses.

343. *Betamax*, 104 S. Ct. at 796, 819.

344. E.g., S. 175, 98th Cong., 1st Sess. (1983) (the "DeConcini Bill"); H.R. 175, 98th Cong., 1st Sess. (1983) (the "Foley Bill").

home video and audio recording but charge a royalty on the sale of VTRs and tapes, to be paid to copyright owners through the medium of the Copyright Royalty Tribunal.<sup>345</sup> The proposed bills would create a new exemption (to be section 119 of the 1976 Copyright Act) and amend section 106 to be "subject to sections 107 through 119." Clearly, such an amendment would not be satisfactory.

Professor Seltzer has demonstrated the distinction between exemptions and fair use.<sup>346</sup> Uses coming under the exemption sections<sup>347</sup> are uses to which the copyright owner's rights do not extend; they are uses which are not within the scope of copyright protection. Fair use, on the other hand, applies, if at all, to uses which are within the scope of copyright protection but which are excused; they are infringements for which the infringer is not liable.<sup>348</sup> The proposed amendments would create a new exemption but with the royalty as the price therefor.

After *Betamax*, one can buy a VTR and video tapes to use for time-shifting without incurring liability to any copyright owner. By what authority can Congress impose a charge for doing this—certainly not by the copyright clause of the Constitution; the Supreme Court has decided that in *Betamax*. Nor does it seem possible under the commerce clause or the taxing power.<sup>349</sup> This lack of regulatory authority is exacerbated by the fact that the royalty collected would be for the benefit specifically of the copy-

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345. S. 31, 98th Cong., 1st Sess. (1983) (introduced by Senator Mathias; captioned "Home Recording Act of 1983"); H.R. 1030, 98th Cong., 1st Sess. (1983) (introduced by Representative Edwards, with the same caption as the Mathias Bill). The Edwards Bill, in earlier form (H.R. 5705, 97th Cong., 2d Sess. (1982), was expressly favored by the Register of Copyright, Mr. David Ladd. See *Home Recording of Copyrighted Works: Hearings on H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 697 (1982).

346. L. SELTZER, *supra* note 10, at 16-17. Professor Seltzer notes that the 1976 Copyright Act somewhat obfuscates the distinction. *Id.* at 17.

347. See 17 U.S.C. §§ 108-18 (1982).

348. L. SELTZER, *supra* note 10, at 16-17.

349. *United States v. Kahriger*, 345 U.S. 22, 37-40 (1953) (Frankfurter, J., dissenting) (Congress's power of taxation should be used only to raise revenue, not to regulate activities such as gambling, which are the states' concerns); *Carter v. Carter Coal Co.*, 298 U.S. 238, 288-89 (1936); *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922) (one of several child-labor tax cases). Although these cases have been largely repudiated, the analysis that taking from one to give directly to another is not a tax survives. See Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 672-73 (1946).

right owners, and not for the public fisc.

Thus, the present proposals are inappropriate. They might be rescued by an amendment to the fair use provision, section 107, excluding time-shifting from fair use. Such a course would, however, have unfortunate consequences. Congress, in enacting section 107, specifically intended to capture the prior judicial doctrine of fair use.<sup>350</sup> The Supreme Court, superficial appearances to the contrary notwithstanding, decided the *Betamax* case in accord with this design. Should Congress now specifically negate the Supreme Court's decision by amending section 107 it would likewise be abrogating its clear original intent for that section. The impact of such an action on our present understanding of the doctrine of fair use would be most disconcerting; the practical effect, indeterminable.

Such a course is also unnecessary. In *Betamax*, the Supreme Court decided only that time-shifting was fair use. The Court did not reach the issue of librarying—that is, of making a copy of a copyrighted broadcast work for repeated future viewing. As none of the reasons which make time-shifting<sup>351</sup> a fair use apply to such copying, there is no reason to believe that it is not still inexcusable infringement. Insofar as librarying occurs, the aggrieved copyright owners should be compensated.

For the reasons given above, no royalty can legitimately be charged on the sale of VTR machines themselves. Nor can a royalty be charged on such video tapes as a VTR owner needs for time-shifting. But good faith time-shifting requires very few video tapes. Thus, an amendment such as the Home Recording Act of 1983<sup>352</sup> could be satisfactory if modified to permit the purchase of a VTR and a specified number of hours (perhaps six) of recording capacity free of the royalty.<sup>353</sup> The royalty would then be assessed only on such video tapes as the VTR owner subsequently purchases.

As copying for librarying is not a fair use, no harm would be done to the doctrine by imposing a royalty on the practice. It is

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350. See *supra* text accompanying note 153.

351. Time-shifting was carefully and narrowly defined by the *Betamax* majority. See *Betamax*, 104 S. Ct. at 779.

352. S. 31, 98th Cong., 1st Sess. (1983); see *supra* note 345 and accompanying text.

353. There would remain the problem of dealing with the legitimate needs of home-video camera users.

within Congress's power to exempt particular infringements from copyright coverage and to exact a royalty as the price for so doing. Such an amendment to the 1976 Copyright Act would, therefore, serve the legitimate interests of all parties.

### CONCLUSION

In United States copyright law, a coherent doctrine of fair use has been developing along stable lines since *Folsom v. Marsh*.<sup>354</sup> Congress succeeded in its aim of representing the judicially developed doctrine in the first statutory recognition of it: section 107 of the 1976 Copyright Act. The courts have, for the most part, followed this statute in accord with Congressional intent. Nevertheless, failure to take full account of the language of the section has led some courts awry.

Both the majority and the dissent in *Betamax* follow the traditional model of fair use as represented in section 107. They differ only in the way in which they construe that model. To the majority, fair use is an equitable rule of reason; the *prima facie* rules of the model are to be applied only when the facts at hand are in accord with the justification of those rules. To the dissent those rules are absolutes—*per se* rules to be applied regardless of the relation of the facts to their rationales. Fortunately, the majority prevailed; fair use retains its sensible, flexible character.

Although both the majority and the dissent in *Betamax* invite Congress to reexamine the issue, the opinion sets limits on what Congress can do. Should Congress choose to act, it can do so without disrupting the doctrine of fair use by creating an exemption for noncommercial home VTR copying for librarying purposes while not touching time-shifting itself. The price for such an exemption would be a royalty on all recording capacity (that is, on the purchase of video tapes) beyond that necessary for time-shifting.

The developed judicial and statutory model of the fair use doctrine remains intact after *Betamax*. That fair use is an equitable rule of reason has been reemphasized; it must be applied judiciously and with sensitivity to its purpose and the facts of each case. This is no easy task, except in the most straightforward

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354. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).



cases; such is to be expected in a law governing such diffuse and variegated subject matter.